

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

MAXIMO VILLALOBOS, et al.,

Plaintiffs

v.

CIVIL 97-1589 (JAG)

NORTH CAROLINA GROWERS
ASSOCIATION, INC., et al.,

Defendants

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

I. Factual Background

This matter is before the court on a multifaceted and voluminous motion for partial summary judgment filed by defendants on June 30, 2000. (Docket No. 115.) The plaintiffs filed a response to the motion on August 21, 2000. (Docket No. 141.)

II. Legal Standard for Partial Summary Judgment

The standard for partial summary judgment is identical to that for summary judgment under Federal Rule of Civil Procedure 56(c). SCHS Assoc. v. Cuomo, 139 F. Supp. 2d 238, 244 (D.R.I. 2001). For the purposes of summary judgment, the moving party always has the initial burden of showing the absence of a genuine issue concerning any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986); Morrissey v. Boston Five Cents Sav. Bank, 54 F.3d 27, 31 (1st Cir. 1995). Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). See Celotex Corp., 477 U.S. at 323, 327; Blackie v. Maine, 75 F.3d 716, 721 (1st Cir. 1996); Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990).

The court must view the entire record, including the opposing party's probative evidence, in the light most hospitable to the non-moving party, indulging all reasonable

s/cs:to (11)
attys/pts
in ICMS 9/6/01

187

1 CIVIL 97-1589 (JAG)

2

3 inferences in that party's favor. United States v. One Parcel of Real Prop. With Bldgs., etc.,
4 960 F.2d 200, 204 (1st Cir. 1992); Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir.
5 1990). If reasonable minds could differ as to the significance of the evidence, summary
6 judgment should be denied. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51
7 (1986); Boston Five Cents Sav. Bank v. Secretary Dep't of Housing & Urban Dev., 768
8 F.2d 5, 8 (1st Cir. 1985).

9 Subsequent to the moving party's fulfillment of its initial showing, the burden shifts
10 to the non-movant to establish the existence of at least one fact issue which is both
11 "genuine" and "material." Griggs-Ryan v. Smith, 904 F.2d at 115; Garside v. Osco Drug,
12 Inc., 895 F.2d at 48. A factual dispute is "genuine," and precludes the granting of summary
13 judgment, if a reasonable trier of fact could resolve the disagreement in favor of the non-
14 moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. at 248; United States v. One
15 Parcel of Real Prop. With Bldgs., etc., 960 F.2d at 204. A "material" fact is one which has
16 the potential to change the outcome of the suit under the governing substantive law, if
17 found favorable to the non-movant. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S.
18 at 248; Martínez v. Colón, 54 F.3d 980, 984 (1st Cir.), cert. denied, 516 U.S. 987 (1995);
19 United States v. One Parcel of Real Prop. With Bldg., etc., 960 F.2d at 204; Griggs-Ryan
20 v. Smith, 904 F.2d at 115.

21 Where the non-moving party will bear at trial the burden of proof of such a
22 "genuine" and "material" fact, it must, in its response, make a sufficient showing
23 establishing the existence of a factual dispute requiring the trier of fact to resolve the
24 parties' differing versions of truth at trial. Celotex Corp. v. Catrett, 477 U.S. at 323; First
25 Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); United States v.
26 One Parcel of Real Prop. With Bldg., etc., 960 F.2d at 204. Failure to do so would
27 mandate the entry of summary judgment. Celotex Corp. v. Catrett, 477 U.S. at 322.
28

CIVIL 97-1589 (JAG)

3

III. Application

A) Statute of Limitations

The Migrant and Seasonal Agricultural Workers Protection Act (hereinafter AWP¹) itself does not provide for a statute of limitations. In such cases, the courts have traditionally deferred to the most analogous state statute and borrowed its corresponding limitations period. Barajas v. Bermúdez, 43 F.3d 1251, 1255 (9th Cir. 1994); Rivera v. Anaya, 726 F.2d 564, 567 (9th Cir. 1984); Medrano v. D'Arrigo Bros. Co. of California, 125 F. Supp. 2d 1163, 1168 (N.D. Cal. 2000).

The defendants' first ground for summary judgment is based on their contention that prior to plaintiffs' filing of the complaint, the cause of action had prescribed. In particular, they argue that plaintiffs' claims arising from the defendants' allegedly misleading and/or false disclosures made during their recruitment period are governed by the three-year statute of limitations of article 1867 of the Puerto Rico Civil Code. 31 P.R. Laws Ann. § 5297(3), art. 1867.² As an alternative to this proposition, plaintiffs suggest the application of article 1864 of the Puerto Rico Civil Code, which would allow for a fifteen-year statute of limitations for damages arising out of a breach of contract. 31 P.R. Laws Ann. § 5294, art. 1864.³

Defendants' argument is based on the proposition that the accrual of the three year-time limit should be counted from April 20, 1994, the day when the recruitment period

¹Some courts abbreviate the Act as "MSPA" or "MSAWPA." I adopt the usage in Adams Fruit Co. v. Barrett, 494 U.S. 638, 640 (1990).

²Actions governed by this article are, *inter alia*, those "(3) [f]or the payment of ... laborers the amounts due for their services, and for the supplies or disbursements they may have incurred with regard to the same."

³Title 31 P.R. Laws Ann. § 5294, art. 1864 reads, in its relevant portion: "those [actions] which are personal and for which no special term of prescription is fixed, [prescribe] after fifteen (15) years."

1 CIVIL 97-1589 (JAG)

4

2
3 ended. To support the applicability of article 1867, defendants cite Aponte Martínez v.
4 Srio. de Hacienda, E.L.A., in as much as the article allows laborers to seek redress as to
5 terms, conditions, and benefits. Aponte Martínez v. Srio. de Hacienda, E.L.A., 125 D.P.R.
6 610, 623 (1990). The argument omits any reference to the case's holding that this
7 section's statute of limitations does not begin to accrue until the worker ceases to perform
8 services for the employer. Id. at 622. In this case, plaintiffs did not arrive in North
9 Carolina until April 19 and 20, 1994, and did not start to work until after these dates.
10 Thus, even if this article applied, the statute of limitations would not have run until much
11 later than April 20, 1997.

12 Plaintiffs' alternative position—the application of article 1864's statute of
13 limitations—seems to gather support from the policy underlying the AWPAA and from well-
14 established jurisprudence. As to AWPAA's policy goals, Congress has made it clear that the
15 driving motivations behind the enactment include the congressional recognition that
16 "[b]ecause of [a] virtually insurmountable wall of economic, social, educational, language,
17 and cultural barriers facing [most migrant and seasonal agricultural workers,] their reliance
18 upon [the farm labor] contractor is extraordinarily heavy, and in many cases, total." See
19 Barajas v. Bermúdez, 43 F.3d at 1253-54. It is imperative that AWPAA's provisions be
20 construed broadly so that "the most abused of all workers in the United States," who shift
21 about the country to meet the professed needs of employers who voluntarily use the
22 resources of the federal government, shall amply enjoy the Act's intended humanitarian
23 purposes. See id. at 1260 (citing to H.R. Rep. No. 97-885, at 2, 97th Cong., 2nd Sess. 16,
24 reprinted in 1982 U.S.C.C.A.N. 4547, 4548 (1982)); Aguero v. Christopher, 481 F. Supp.
25 1272, 1275 (S.D. Tex. 1980). See also Caro-Galvan v. Curtis Richardson, Inc., 993 F.2d
26 1500, 1505 (11th Cir. 1993). Court decisions thus embody the legislative recognition of
27 the need to "reverse the historical pattern of abuse and exploitation of migrant and seasonal
28

1 CIVIL 97-1589 (JAG)

5

2
3 farm workers[.]” Castillo v. Case Farms of Ohio, Inc., 48 F. Supp. 2d 670, 675 (W.D. Tex.
4 1999) (citing to H.R. Rep. No. 97-885, at 3). The application of state law maximizes the
5 efficacy of the Act’s enforcement and accounts for the itinerant reality of migrant workers’
6 existence, for the likelihood that they will be fearful, intimidated, or unable to assert their
7 rights within a short time limit, for the potential lack of protection state laws may offer
8 these workers, and for the significant language and cultural barriers that burden this
9 increasingly Spanish-speaking labor pool and that are likely to increase the time that it
10 takes them to find representation. See Barajas v. Bermúdez, 43 F.3d at 1260; Beliz v.
11 W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 (5th Cir. 1985); Estados Unidos
12 Mexicanos v. Decoster, 69 F. Supp. 2d 168, 170 (D. Me. 1999).

13 Plaintiffs’ proposition concerning the applicability of article 1864 is amply supported
14 by precedent. For instance, in Barajas v. Bermúdez, 43 F.3d at 1259, the court found that
15 the plaintiffs’ claims as to the defendants’ false and misleading disclosures of the wage rates
16 and other terms and conditions of agricultural employment were most analogous to
17 contract claims. In so doing, the court explicitly chose the longer of two potentially
18 applicable statutes of limitations, finding that the application of the shorter time period
19 would have been inconsistent with AWPAs’ goal to both effectively deter and remedy any
20 violations. Id. Similarly, the court in Sánchez v. Morrison held that Michigan’s six-year
21 statute of limitation for breach of contract was applicable to plaintiffs’ AWPAs claims.
22 Sánchez v. Morrison, 667 F. Supp. 536, 537 (W.D. Mich. 1987). Therein, the court
23 specifically rejected the defendants’ argument that it should apply the three-year statute
24 of limitations applicable to injuries to a person or property or for violations of the state
25 minimum wage laws. Sánchez v. Morrison, 667 F. Supp. at 537. It additionally rejected
26 the notion that, because employers need only keep records for three years to comply with
27 their AWPAs obligations, the limitations period should be set at three years. Id. at 538.
28

1 CIVIL 97-1589 (JAG)

6

2
3 Likewise, in Marquis v. United States Sugar Corp., the court found that—regardless of a
4 defendant's three-year obligation to keep records under AWPAs—the plaintiffs' AWPAs
5 claims should be governed by the state's four-year statute of limitations on contracts and
6 obligations. Marquis v. United States Sugar Corp., 652 F. Supp. 598, 602 (S.D. Fla. 1987).
7 Finally, in Sánchez v. Overmyer, the court rejected the application of the two-year statute
8 of limitations of Ohio's Portal-to-Portal Act, which generally applies to an employee's
9 actions for wages. Instead, it provided for the application of Ohio's breach of contract
10 statute of limitations. Sánchez v. Overmyer, 845 F. Supp. 1178, 1179 (N.D. Ohio 1993).

11 Defendants accurately maintain that, like Ohio, the Commonwealth of Puerto Rico
12 has enacted legislation that generally applies to a laborer's actions for wages and other
13 employment related claims. See 31 P.R. Laws Ann. § 5297(3), art. 1867. While there is
14 no indication that Congress intended the federal courts to adopt a uniform state law
15 borrowing a source for AWPAs actions, Barajas v. Bermúdez, 43 F.3d at 1257, the
16 defendants have not provided this court with any valuable reason not to follow the
17 Overmyer court's lead and apply instead Puerto Rico's general breach of contract provision.
18 Though clearly AWPAs are a broad network of legal protection that may encompass more
19 than one state law cause of action, Barajas v. Bermúdez, 43 F.3d at 1258, application of
20 the Commonwealth's law must not effectively take away these workers' rights nor render
21 AWPAs inaccessible and ineffectual. Nevertheless, regardless of which statute of limitations
22 applies, plaintiffs' complaint is not time-barred. It is therefore unnecessary to determine
23 which of the plausible statute of limitations should apply. I therefore recommend that
24 defendants' motion for summary judgment based on the defense of limitations be
25 DENIED.

26 B) Written Disclosures
27
28

1 CIVIL 97-1589 (JAG)

7

2
3 AWWPA's section 1821 states that "each" "farm labor contractor, agricultural
4 employer, and agricultural association" seeking to recruit any migrant farm worker shall
5 ascertain and disclose certain required information "in writing," accurately, intelligibly, and
6 with particularity to "each such worker" at the time of recruitment. See 29 U.S.C. §§
7 1821(a), (f), and (g). Cf. Washington v. Miller, 721 F.2d 797, 801 (11th Cir. 1983)
8 (discussing AWWPA's less stringent predecessor, the Farm Labor Contractor Registration Act
9 (FLCRA)). The Act's legislative history unequivocally confirms the import of the statute's
10 plain meaning: that it was purposefully engineered to grant each and every worker an
11 independent and individual right to receive a written ratification of all of the material terms
12 and conditions of employment and to be intelligibly and comprehensively appraised of his
13 or her prospective working arrangements. See H.R. Rep. No. 97-885, at 14, 15. See also
14 Bueno v. Mattner, 829 F.2d 1380, 1384 (6th Cir. 1987) (every individual worker is
15 independently entitled to a written disclosure of the terms and conditions of employment).
16 When undertaking the evaluation of a statute's construction and appropriate
17 interpretation, the starting point must be the language of the statute. See Brady v. Credit
18 Recovery Co., 160 F.3d 64, 67 (1st Cir. 1998). In general, statutes should be construed so
19 that no word, clause, sentence, provision, or part is rendered superfluous, meaningless, void,
20 or insignificant, if that result can be reasonably avoided. See Williams v. Taylor, 529 U.S.
21 362, 404 (2000); United States v. Rodríguez, 26 F.3d 4, 8 (1st Cir. 1994); United States
22 v. Fontana, 948 F.2d 796, 803 (1st Cir. 1991). Courts should be particularly unwilling to
23 treat statutory terms as surplusage when the term occupies a pivotal place in the statutory
24 scheme. See Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S.
25 687, 698 (1995); see also Ratzlaf v. United States, 510 U.S. 135, 140 (1994).

26 Therefore, these AWWPA-required disclosures must necessarily include the place and
27 period of employment, the wage rate, the kinds of crops and kinds of activities each worker
28

1 CIVIL 97-1589 (JAG)

8

2
3 would be employed to perform, the housing and transportation arrangements, and the
4 existence of a workers' compensation program or any other employment benefits. See 29
5 U.S.C. § 1821(a). Though the actual need for these full and comprehensible written
6 disclosures may be greatest for those agricultural employees who are physically unable to
7 verify the conditions of employment before accepting an offer and who must undertake
8 their relocation in reliance of an employer's representations, this right is imperative and
9 unqualified. See H.R. Rep. No. 97-885, at 14.

10 Both the Act and its congressional record emphasize written disclosures as the only
11 effective means of ensuring that agricultural employers will, to the greatest extent possible,
12 provide each recruit with this information, before the worker actually undertakes his
13 journey. See H.R. Rep. No. 97-885, at 14. To maximize the achievement of this
14 humanitarian goal, the courts have required that farm labor contractors, agricultural
15 employers, and agricultural associations disclose this information not only in a language in
16 which the worker is fluent, 29 U.S.C. § 1821(g), but forthrightly and in a manner
17 understandable to such workers. Cf. De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d
18 225, 239 (7th Cir. 1983) (disclosure, when pertinent, should be written in "understandable"
19 Spanish); Alvarez v. Joan of Arc, Inc., 658 F.2d 1217, 1221 (7th Cir. 1981) (FLCRA).

20 Accordingly, these disclosure requirements cannot be satisfied by simply publishing
21 or disseminating varying, inaccurate, and/or confusing terms and conditions, leaving the
22 worker to guess which terms are applicable and correct. Cf. Washington v. Miller, 721 F.2d
23 at 801. Neither is there any authorization in the Act for the substitution of written
24 disclosures with oral discussions or interrogations. Even a worker's own purported
25 agreement to waive this requirement shall be void as contrary to our Nation's public policy
26 and welfare. See 29 U.S.C. § 1856. In light of these non-discretionary specifications, a
27
28

1 CIVIL 97-1589 (JAG)

9

2
3 defendant's decision not to comply with the "in written form" requirement as to each such
4 worker would inexorably result in a violation of AWPAs.

5 Defendants argue that "the record is clear and uncontroverted that ... NCGA made
6 every effort to advise the workers about the terms and conditions of the [farm] jobs for
7 which it was recruiting"⁴ and that therefore summary judgment is warranted as to what
8 they allege was their full and proper compliance with all of AWPAs's written disclosure
9 requirements. In supporting this argument, defendants direct the court to the NCGA-
10 prepared Job Orders,⁵ their Attachments,⁶ the Work Rules,⁷ and the Agricultural Work
11 Agreement.⁸ Defendants thus allege these documents were made available to all plaintiffs
12 at the time of recruitment, and that they contained all the required information accurately,
13 intelligibly, and with particularity.⁹

14 As to the delivery of these documents, the evidence on the record belies defendants'
15 arguments. According to Puerto Rico Department of Labor staff members, only the first
16 page of the Job Clearance Orders—in English—was initially received. See Docket No. 115,
17 Defendants' Memorandum for Summary Judgment, deposition of Mateo Vélez Sánchez,
18 at 23, ll. 16-25; deposition of Lizette Vélez Cordero, at 16, ll. 5-6, 13-14; at 49, ll. 22-23.

19
20 ⁴See Docket No. 115, Defendants' Memorandum in Support of Motion for Partial
21 Summary Judgment (hereinafter "Defendants' Memorandum for Summary Judgment") at
15.

22 ⁵See id., Exhibit 1, Job Order No. 7930794 and Job Order 7931086.

23 ⁶See id., Exhibit 1.

24 ⁷See id.

25 ⁸See id., Exhibits 1 and 12. Defendants additionally point to the plaintiffs' signing
26 of an "Acceptance of Orientation" letter. This Puerto Rico Department of Labor-prepared
27 letter, which was merely used by the local offices as an antecedent to the workers' referral
28 to the NCGA job order, has no evidentiary value as to whether or not defendants delivered
the required disclosures.

⁹The substantive quality of the disclosures is the subject matter of the rest of this
report and recommendation.

1 CIVIL 97-1589 (JAG)

10

2
3 See also Docket No. 141, Plaintiffs' Opposition, Exhibit 5, deposition of Mateo Vélez
4 Sánchez, at 33, ll. 12-16; Exhibit 7, deposition of Lizette Vélez Cordero, at 27, ll. 21-25;
5 at 28, ll. 1-6; at 29, ll. 5-10, 15-17; Exhibit 29, deposition of Alfredo Vargas, at 9, ll. 20-25
6 (stating that the job order was received from Puerto Rico Department of Labor's central
7 office in English and that the local office had to translate its contents to Spanish); Exhibit
8 26, deposition of Baudilio Polanco Acevedo, at 80 (stating that his Puerto Rico Department
9 of Labor local office only received the first page of the job order). The job order's terms
10 and conditions of employment were not actually explained to the workers until after they
11 had been "accepted" by the employer—and even then not by any of NCGA's
12 representatives, but rather by Puerto Rico Department of Labor staff. (Docket No. 141.)
13 See Docket No. 115, Defendants' Memorandum for Summary Judgment, deposition of
14 Lizette Vélez Cordero, at 29, ll. 5-10, 15-17. It was also at this point—after they had
15 already been hired by NCGA and were already well on their way to North Carolina—that
16 the workers were exposed to Puerto Rico Department of Labor-prepared Spanish summaries
17 of the job order's first page and work rules. See Docket No. 115, Defendants'
18 Memorandum for Summary Judgment, deposition of Mateo Vélez Sánchez, at 30, ll. 7-17
19 (initially, Puerto Rico Department of Labor local offices communicated the terms and
20 conditions to the workers orally; only when they are about to leave the country did they
21 provide them with a summary in writing and in Spanish of certain documents); deposition
22 of William Tirado Calero, at 16, ll. 6-10 (stating that the "listing" workers were exposed
23 to at the Aguadilla's local office included only what the first page of the job offer
24 contained); deposition of Alfredo Vargas, at 19, ll. 23-25; at 21, ll. 21-22; at 22, ll. 3-13
25 (stating that workers received a copy of the job order in English, as well as a summary in
26 Spanish, which included information that they would work with "tobacco or cucumbers,
27 hay and straw," for the hourly rate of \$5.38); deposition of Ramón E. Toro Martínez, at
28

CIVIL 97-1589 (JAG)

11

16, ll. 10-12; at 22, ll. 14-16; at 25, ll. 19-25; at 39, ll. 12-15 (At the Puerto Rico Department of Labor's Ponce local office, workers were handed a summary of the job order's first page and the work rules in Spanish.). See also Docket No. 141, Plaintiffs' Opposition, Exhibit 4, deposition of Eileen Ramírez Colón, at 33, l. 6 (stating that a summary of these documents, prepared by each local job services office, would have been "shown" to each farm workers); Exhibit 5, deposition of Mateo Vélez Sánchez, at 61, ll. 12-13; Exhibit 20, deposition of Manuel Aponte Rivera, at 12, ll. 22-25; at 13, ll. 1-2 (stating that he was only provided the work rules); Exhibit 26, deposition of Baudilio Polanco Acevedo, at 103, ll. 14-21 (stating that workers were given a summary of the first page of the job offer); Exhibit 29, deposition of Alfredo Vargas, at 24 (where it is unclear from the transcript whether the workers received the Agricultural Work Agreement or the work rules). Even NCGA's Stan Eury, Jr., admits that, prior to NCGA's telephonic interview of plaintiffs, "the workers had not been exposed to the terms and conditions of the job."¹⁰ Rather than immediately making any efforts to transmit any and all of the relevant information to the workers, as required of employers by 29 U.S.C. § 1821, following these interviews, NCGA contends that it attempted to delegate its responsibilities to the Puerto Rico Department of Labor, asking "that [the workers] be exposed to the terms and conditions."¹¹

Yet, AWPA is clear in its language and 29 U.S.C. § 1821 does not impose any duties on the Puerto Rico Department of Labor. The defendants' mere placing of the job offer in the clearance order system does not bestow on the Puerto Rico Department of Labor the kind of employment agency ability to recruit workers for a particular job offer that would

¹⁰See Docket No. 141, Plaintiffs' Opposition, Exhibit 1, at 179, ll. 10-15.

¹¹See id., Exhibit 1, at 179, ll. 10-15.

1 CIVIL 97-1589 (JAG)

12

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

allow it to contract without consulting NCGA.¹² See López-Rivas v. Donovan, 629 F. Supp. 564, 568 (D.P.R. 1986) (absent express, official designation, placement of the job offer in the clearance system does not enable the employment agency to recruit workers for particular job offer without consulting the employer). Clearly, rather than performing delegated hiring functions, the Puerto Rico Department of Labor's tasks encompassed little more than simple referral services.¹³ Defendants' attempt to justify their inadequate business practices, therefore, is meritless.

(i) Written Disclosures: In a Language Common to Plaintiffs

In their summary judgment motion, defendants admit that it was the Puerto Rico Department of Labor, and not they, that made "the necessary translations of the Job Orders into Spanish."¹⁴ Defendants, however, insist that, because "[t]he DOL regulations recognize the employer's inability to know where the job orders will be sent in the interstate clearance system," the regulations accordingly "impose the obligation on the local recruiting office to disclose the terms and conditions of the job orders in a known language to the workers."¹⁵ Yet, this argument is irrelevant to defendants' obligations under AWP.

19

20

21

22

23

24

25

26

27

28

¹²See Docket No. 115, Defendants' Memorandum for Summary Judgment, Deposition of James Tull Hill, III, at 53, ll. 8-14 (where Mr. Hill acknowledges that it was up to NCGA, not the Puerto Rico Department of Labor, to make the ultimate hiring determination); deposition of Eileen Ramírez Colón, at 79, ll. 4-7 (stating that defendants were in charge of selecting the workers); deposition of Alfredo Vargas, at 33, ll. 2-6 (stating that defendants "decided it right then and there, they would say such and such can go; there were others who did not qualify"); see also Docket No. 141, Plaintiffs' Opposition, Exhibit 17, interview between Santos Orellana and Rafael Vélez (where Mr. Orellana states that he "fill[s] out the interviews and from here I pass them down to my boss ... he is the one that decides" whether or not to hire the workers).

¹³See 20 C.F.R. § 651.10. Therein, job referral is defined as "the act of bringing to the attention of an employer an applicant or group of applicants who are available for specific job openings[.]"

¹⁴See Docket No. 115, Defendants' Memorandum for Summary Judgment, at 23.

¹⁵See Docket No. 115, Defendants' Memorandum for Summary Judgment, at 23.

CIVIL 97-1589 (JAG)

13

The clear language of AWPAs 29 U.S.C. § 1821 does not impose any duties on Puerto Rico Department of Labor, but rather on each “farm labor contractor, agricultural employer, and agricultural association.” Additionally, notwithstanding “the difficulty that may arise in providing some workers who are not fluent in English with the information required under this section,” the Department of Labor’s failures, if any, shall not be the basis for a defense in an action brought against employers by migrant workers. Cf. H.R. Rep. No. 97-885, at 16.

Defendants contend that they fully complied with the Act’s provisions and regulations by transmitting to the Puerto Rico Department of Labor a copy of the job order’s first page, although it contained only incomplete information, was arguably not made available to all the Puerto Rico farm workers,¹⁶ and was not furnished in Spanish, “a language common” to plaintiffs, who were not fluent or literate in English.¹⁷ 29 U.S.C. § 1821(g).¹⁸

¹⁶See Docket No. 141, Plaintiffs’ Opposition, Exhibit 20, deposition of Manuel Aponte Rivera, at 12, ll. 22-25; at 13, ll. 1-2 (stating that he was only provided a copy of the work rules, never a copy of the job order); Exhibit 29, deposition of Alfredo Vargas, at 24 (where it is unclear from the transcript whether the workers received the Agricultural Work Agreement or the work rules).

¹⁷Defendants also argue compliance based on their alleged transmission of a copy in Spanish of the work rules and the Agricultural Work Agreement, although these do not give complete AWPAs disclosures.

¹⁸Title 29 U.S.C. § 1821(g) reads:

The information required to be disclosed by subsections (a) through (c) of this section to migrant agricultural workers shall be provided in written form. Such information shall be provided in English or, as necessary and reasonable, in Spanish or other language common to migrant agricultural workers who are not fluent or literate in English. The Department of Labor shall make forms available in English, Spanish, and other languages, as necessary, which may be used in providing workers with information required under this section.

1 CIVIL 97-1589 (JAG)

14

2
3 Defendants thus reassert their already rejected “reasonableness” defense, Villalobos
4 v. North Carolina Growers Ass’n, Inc., 42 F. Supp. 2d 131, 138 (D.P.R. 1999), in as much
5 as they insist they had “no prior knowledge that their job order would be filed in Puerto
6 Rico.”¹⁹ They reargue their already rejected claim that they cannot be held liable for the
7 deficiencies in their own clearance orders.

8 Additionally, defendants argue that once they became aware that their job orders
9 had been filed in Puerto Rico, they took “reasonable and necessary steps ... to ensure that
10 the terms and conditions of the job orders were presented in writing, and orally, in Spanish,
11 to plaintiffs at the time of recruitment and prior to their departure to North Carolina.”²⁰
12

13 In asserting this argument, the defendants are invoking language explicitly defined
14 by AWPAs legislative history on the question of translation. Namely, Congress
15 determined that an agricultural employer should not be held liable for a violation of the Act
16 by his failure to provide the necessary information in writing in a language which is only
17 “the primary language of a small number of workers.” H.R. Rep. No. 97-885, at 16-17.
18 The Congressional guidelines provided to measure an employer’s “reasonable and
19 necessary” compliance regarding this issue include the number of workers involved, the
20 frequency of hiring workers whose primary language is in question, the provision of
21 language-specific forms by the Department of Labor, and the reasonable steps taken by the
22 employer. See id.

23 Since this court rejected these same arguments in Villalobos v. North Carolina
24 Growers Ass’n, Inc., 42 F. Supp. 2d at 137-38, it has been furnished with no reason to
25 depart from its earlier conclusions that there is ample evidence that the defendants knew
26 or should have known that a significant amount of its workers would be native Spanish

27 ¹⁹See Docket No. 115, Defendants’ Memorandum for Summary Judgment, at 17.

28 ²⁰See id. at 17.

1 CIVIL 97-1589 (JAG)

15

2
3 speakers, that their clearance order would likely make their way into Puerto Rico, and that
4 simply submitting their clearance order to the Employment and Training Association (ETA)
5 was not enough to satisfy the “reasonable and necessary” AWP standard. Villalobos v.
6 North Carolina Growers Ass’n, Inc., 42 F. Supp. 2d at 137-38

7
8 In its 1999 Villalobos v. North Carolina Growers Ass’n, Inc. decision, the court
9 stated:

10 We are unpersuaded by Defendants’ claims that they had no idea where their
11 clearance orders were going to be sent. A recent Department of Labor report
12 found that 78% of all farm workers in the United States are of Hispanic
13 origin. It is implausible to believe that Defendants, agricultural contractors
14 and an agent and joint agricultural employer in North Carolina, had no idea
that the recruited workers would be largely of Hispanic origin. Additionally,
the ETA regulations specifically require that positive recruitment should be
conducted in areas with “traditional or expected labor supply” Puerto Rico
is an area with a “traditional or expected labor supply” for agricultural
workers.

15 Villalobos v. North Carolina Growers Ass’n, Inc., 42 F. Supp. 2d at 137-38.²¹

16 Similarly, as to the defendants’ insistence that their mere submission of the job offer
17 to the ETA clearance system could have somehow relieved them of their AWP
18 responsibility,²² the court in Villalobos v. North Carolina Growers Ass’n, Inc. already
19 addressed the fact that the ETA does not enforce AWP and that the Act’s broad scope

20
21
22
23 ²¹Cf. Edwards v. Johnston County Health Dep’t, 885 F.2d 1215, 1217 (4th Cir.
24 1989) (stating that more than 90% of migrant farm workers in Johnston County, North
Carolina are non-white).

25 ²²See Docket No. 115, Defendants’ Memorandum for Summary Judgment, at 18,
26 where defendants claim that the “ETA’s approval confirms that the Job Orders disclosed
27 the proper terms and conditions of employment, and that there were no deficiencies
28 rendering the Job Orders unacceptable.” To support this contention, defendants cite to
López-Rivas v. Donovan, 629 F. Supp. at 568, a case not about AWP, but rather about
ETA enforcement of its own regulation.

CIVIL 97-1589 (JAG)

16

and purpose exceeds ETA's limited mandate over employers hiring non-migratory foreign workers.²³ Villalobos v. North Carolina Growers Ass'n, Inc., 42 F. Supp. 2d at 137.

As to the availability of Spanish-language forms by the Department of Labor, the Department has created Form WH-516, which conveniently translates, side-by-side with the English version, each of the required AWPAs information prongs.²⁴ An agricultural labor contractor willing to comply with its AWPAs obligations can readily avail himself of this resource. This form—of which defendants were otherwise aware and otherwise employed—could have easily been accurately completed and provided to the workers, but was not.²⁵

²³In addition, given that “[t]he availability of U.S. workers can be tested only if U.S. workers are actively recruited ...,” 20 C.F.R. § 655.90(b)(c), a defendant’s failure to comply with 29 U.S.C. § 1821(g) could directly and inevitably sabotage the established procedures to determine whether or not an employer may be authorized to solicit non-immigrant foreign agricultural workers. This procedure entails a preliminary determination of whether or not there are sufficient able, willing, and qualified United States workers available. 20 C.F.R. § 655.90(b)(1)(A). See also 20 C.F.R. § 655.90(b)(2). Such failure may thus result in the frustration of the purpose of AWPAs, its federal regulations, and the Immigration Reform and Control Act (successor to the Immigration and Nationality Act) that United States workers rather than aliens be employed wherever possible. Hernández Flecha v. Quirós, 567 F.2d 1154, 1156 (1st Cir. 1977), cert. denied, 436 U.S. 945 (1978); Elton Orchards, Inc. v. Brennan, 508 F.2d 493, 500 (1st Cir. 1974). See also 20 C.F.R. § 655.102(a).

²⁴See Docket No. 141, Plaintiffs’ Opposition, Exhibit 25. Yet, even if the Department of Labor had failed to make available such forms, this failure alone could not have been the basis for a defense by any of the defendants. See H.R. Rep. No. 97-885, at 16, 1982 U.S.C.C.A.N. at 4562.

²⁵In his deposition, Stanford Eury, Jr., acknowledges that NCGA, using information from the job order, filled out a WH-516 form, which was then posted at the housing facility and provided to each employer to give to any United States applicant for information purposes. See Docket No. 141, Plaintiffs’ Opposition, Exhibit 1, deposition of Stanford Eury, Jr., at 118, ll. 19-24; at 119, ll. 14-20.

CIVIL 97-1589 (JAG)

17

Additionally, the defendants maintain that they fully complied with 29 U.S.C. § 1821 by “conduct[ing] interviews in Spanish with recruited workers.”²⁶ However, there is no evidence on record that tends to prove that during these interviews the defendants took any reasonable and necessary steps towards disclosing the terms and conditions of employment to the Puerto Rican recruits. To the contrary, the only transcripts of those interviews that the defendants have produced show that NCGA representatives limited themselves to testing the workers’ knowledge of the work rules, asking applicants whether they had checked other offers of employment,²⁷ and inquiring whether they had worked with, or had any allergies to, tobacco.²⁸

Only once did one of NCGA’s representatives, Santos Orellana, make time to explain any contractual terms, i.e., the three-quarters guarantee and the fifty percent transportation procedure, to one of the workers, namely, Juan González Gauthier.²⁹ More representative

²⁶See Docket No. 115, Defendants’ Memorandum for Summary Judgment, at 17.

²⁷See Docket No. 141, Plaintiffs’ Opposition, Exhibit 17, transcript of telephone interview between Santos Orellana and Manuel Vega García; Jay Hill and Edson Cupeles Rivera; see also Docket No. 115, Defendants’ Memorandum for Summary Judgment, deposition of Mateo Vélez Sánchez, at 39, ll. 10-14 (stating that “there is a little discouragement ... in North Carolina, for instance. Why do you come ... why do you want to come to my farm ... when there are so many farms in the country? And I always objected to that ... always objected to that ... why do you want to come”)

²⁸See Docket No. 141, Plaintiffs’ Opposition, Exhibit 17, transcript of telephone interview between Santos Orellana and David Orengo; between Santos Orellana and Rafael Vélez; and between Jay Hill and Edson Cupeles Rivera. See also Docket No. 115, Defendants’ Memorandum for Summary Judgment, deposition of James Tull Hill, III (alias, “Jay Hill”) at 44, ll. 17-24 (where he admits that, rather than disclosing terms, he “quizzed” the workers and asked them to explain the terms and conditions of employment).

²⁹See Docket No. 141, Plaintiffs’ Opposition, Exhibit 17, transcripts of telephone interview between Santos Orellana and Juan González Gauthier. See also Exhibit 17, transcripts of telephone interviews between Santos Orellana and David Orengo, Alfredo Nazario, Manuel Vega García, and Rafael Vélez; and between Jay Hill and Edson Cupeles Rivera.

1 CIVIL 97-1589 (JAG)

18

2
3 is the interview between Santos Orellana and Rafael Vélez, during which Mr. Orellana's
4 inquiries and explanations as to the necessary documentation a worker should have
5 received consisted of the following: "Have you been given a sheet of paper where it says
6 what type of work it is ... and this and this and this ... and a whole bunch ... of ..."³⁰
7 (court's translation), this just a few moments after Orellana had told plaintiff Vélez that
8 his job was "to make sure that you understand the type of work that you come to perform
9 here, how long the work will last, how much is fifty-percent ... because when you get here
10 you say I was not told that ... I didn't know that I came here ... do you understand?"³¹
11 (Court's translation.)

12 While oral disclosures may undoubtedly supplement and enhance the recruitment
13 process and the prospective worker's understanding and familiarization with the specific
14 contractor's employment policies and needs, there is no provision in the Act for the
15 substitution of the delivery of written documentation with oral interviews. See Escobar v.
16 Baker, 814 F. Supp. 1491, 1504-05 (W.D. Wash. 1993). Moreover, even if such an
17 alternative was permissible, the record shows that the exchanges undertaken during these
18 interviews did not result in the disclosure of AWPAs-required information.

19 The record does not even support a finding that the defendants ensured the
20 transmission to all plaintiffs of a copy of the Agricultural Work Agreement in Spanish.³²
21 This document, which is simply a catalogue list of terms, includes the possibility of work
22 in any of about 35 different crops, 10 different paragraphs as to the possible tasks workers
23

24 ³⁰See Docket No. 141, Plaintiffs' Opposition, Exhibit 17, transcript of telephone
25 interview between Santos Orellana and Rafael Vélez.

26 ³¹Id.

27 ³²See Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibit
28 1; Exhibit 12. The record, however, seems to indicate that some plaintiffs may have
received a summary of the Agreement. See Docket No. 141, Plaintiffs' Opposition, Exhibit
5, deposition of Mateo Vélez Sánchez, at 34, ll. 9-25; at 35, ll. 1-6.

1 CIVIL 97-1589 (JAG)

19

2
3 could expect, and about 25 different pay rates for different tasks and crops. Such
4 disclosure could not meet the standards of accuracy, clarity, and specificity necessary to
5 comply with AWPAs.

6 In view of the above, I find that the defendants have not made a showing of
7 reasonableness concerning their admitted failure to translate and their failure to transmit
8 the Act's required information in writing, accurately, intelligibly, with particularity, and in
9 Spanish to plaintiffs at the time of recruitment. I therefore recommend that the motion
10 for summary judgment by the defendants in relation to their compliance with this provision
11 be DENIED.

12 (ii) Written Disclosures: Place of Employment

13 Title 29 U.S.C. § 1821(a)(1) clearly establishes that the defendants had the
14 inescapable obligation to ascertain and disclose to each prospective migrant agricultural
15 worker the place of employment at the time of recruitment. Defendants, however, allege
16 that they were not required by AWPAs or by federal regulation to disclose to each of the
17 Puerto Rican migrant workers the name and location of the grower they would be assigned
18 to. They contend that, because under 20 C.F.R. § 655.106(c), associations may be allowed
19 to transfer workers hired pursuant to a temporary H-2A labor certification among its
20 members, the defendants were exempt from their primary AWPAs compliance. Yet,
21 regardless of whether or not they were hired under a job order intended to solicit H-2A
22 workers, plaintiffs' rights as migrant workers and United States citizens cannot be waived
23 or extinguished by any of their own or by any of the defendants' actions. The pertinent
24 federal regulations assert that "[w]ritten agreements do not relieve any person of any
25 responsibility that the person would otherwise have under the Act or these regulations."
26 29 C.F.R. §§ 500.72(b). Therefore, regardless of NCGA's intentions in filing the job order,

27
28

1 CIVIL 97-1589 (JAG) 20

2

3

4 the defendants' desire to hire H-2A workers—rather than Puerto Rican United States
5 citizens—would not relieve them of their obligations under AWP. See 29 U.S.C. § 1856.

6

7 Alternatively, the defendants' represent as an uncontested fact that they transmitted
8 to plaintiffs an attachment to the job order "list[ing] the address and phone number for
9 each farming operation to which workers could be referred."³³ There is, however, no
10 evidence in the record as to the receipt by plaintiffs of any such document purportedly
11 attached to these orders.

12

13 Finally, the defendants contend that the job order's inclusion of NCGA's post office
14 box address and of the general statement that employment would be located in "various
15 counties in N.C., U.S.A." suffices to fulfill their AWP obligations.³⁴ In its 1984 Opinion
16 Letter No. 1577 (WH-524) interpreting AWP, the United States Department of Labor
17 underscored that the requirement to disclose the place of employment can only be fulfilled
18 by providing information with as much specificity as possible.³⁵ In terms of the name and
19 address of the employer, this requirement refers to the actual grower employer and to the
20 physical location of the place of employment—including the number, street, city or town,

21

22 ³³SMOF, ¶ 15. See also Docket No. 115, Defendants' Memorandum for Summary
23 Judgment, at 18-19.

24 ³⁴See Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibit
25 1; Exhibit 12 (including the Spanish equivalent of "various counties in N.C., USA."
26 —"varios condados en North Carolina, EE.UU.").

27 ³⁵United States Department of Labor, Wage and Hour Opinion Letter, Opinion
28 Letter No. 1577 (WH-524), ¶ 31,442 (1984). See Docket No. 141, Plaintiffs' Opposition,
Exhibit 8. As long as an agency stays within congressional delegation, it is within its power
to make policy choices when interpreting a statute, and such choices and interpretations
are entitled to deference by the courts. Arent v. Shalala, 70 F.3d 610, 615 (D.C. Cir.
1995). Moreover, an agency is entitled to an extra measure of deference with regard to
factual questions involving technical in its own area of expertise. Adams v. United States
E.P.A., 38 F.3d 43, 49 (1st Cir. 1994).

CIVIL 97-1589 (JAG)

21

county, and state—not to a business address or a post office box.³⁶ According to the Department of Labor, the purpose of these requirements is to appraise each individual worker, at the time of the offer, of all the material conditions of employment important to a worker's meaningful decision as to whether to accept the offer.³⁷

In his deposition, Stan Eury recognizes that NCGA has tobacco-growing members in four different tobacco belts in North Carolina, the Old Belt, the Middle Belt, the Eastern Belt, and the Border Belt.³⁸ According to published statistics by the North Carolina and United States Departments of Agriculture, these different tobacco belts have both different planting and harvesting dates.³⁹ The actual physical location of employment could likely affect a worker's decision to respond to a job order according to his dates of availability and his opportunity to enjoy work for a longer period of time.⁴⁰

Based on the Department of Labor's long-standing and persuasive interpretation of 29 U.S.C. § 1821(a)(1) and 29 C.F.R. § 500.76(b)(1), I find that neither the mere inclusion of NCGA's post office box address nor the general statement that employment would be located in "various counties in N.C., U.S.A." could have met the required level of heightened specificity mandated by AWP. Moreover, even if the list of grower members, specifying their names and addresses, had been transmitted to plaintiffs, defendants could not have satisfied the disclosure requirement by simply disseminating a

³⁶See Docket No. 141, Plaintiffs' Opposition, Exhibit 8, United States Department of Labor, Wage and Hour Opinion Letter, Opinion Letter 31,442, 1984.

³⁷See Docket No. 141, Plaintiffs' Opposition, Exhibit 8, United States Department of Labor, Wage and Hour Opinion Letter, Opinion Letter 31,442, 1984.

³⁸See *id.*, Exhibit 1, Deposition, at 83, ll. 12-22.

³⁹See *id.*, Exhibit 9. The Old and Middle Belts have planting times usually starting on May 1; the Eastern Belt, on April 15; and the Border Belt, on May 15. *Id.* Harvesting times for the Old and Middle Belts have usually ended on September 15; for the Eastern Belt, August 25; and for the Border Belt, on September 15. *Id.*

⁴⁰See *id.*, Exhibit 7, at 59, ll. 6-11.

CIVIL 97-1589 (JAG)

22

directory of employers and then leaving the worker to guess which one he would be finally assigned to. See Washington v. Miller, 721 F.2d at 801. Disclosure to each recruit with as much specificity as possible is necessary to comply with this requirement. For those reasons, even in conjunction with the other documentation, none of the post office box address, the list, and the general statement cure the defendants' violation of 29 U.S.C. § 1821(a)(1) and 29 C.F.R. § 500.76(b)(1).

In view of the above, I recommend that the motion for summary judgment in relation to written disclosures of place of employment be DENIED.

(iii) Written Disclosures: Wage Rates, Type of Crops, and Kinds of Activities

Defendants contend that they fully complied with their AWPAs obligations to disclose—"in writing" accurately, intelligibly, with particularity, and in a language common to the plaintiff—the applicable and expected wage rate to "each such worker" at the time of recruitment. See 29 U.S.C. § 1821(a)(2). The pertinent federal regulation, however, provides that the precise wage rate need not be disclosed if it is not ascertainable within the recruitment period. See 29 C.F.R. § 500.75(b) (establishing both a good faith effort duty to ascertain wage rates and a duty to timely disclose them).

In such cases, it becomes the defendant's burden to show that he was unable to determine the precise wage rate despite his good faith efforts to do so. Id.; Alex v. Jasper Wyman & Son, 682 F. Supp. 87, 89 (D. Me. 1988). See also Martin v. Cooper Elec. Supply Co., 940 F.2d 896, 908 (3rd Cir. 1991) (FLSA) (good faith requires that employer have honest intention to ascertain and follow dictates of the Act; fact that employer has broken the law for long time without complaints from employees does not demonstrate requisite good faith) (quoting Williams v. Tri-County Growers, Inc., 747 F.2d 121, 129 (3rd Cir. 1984)). Simply publishing a catalogue list of possible pay rates or disseminating varying, inaccurate, and/or confusing wage lists, which ultimately leave the worker to guess

1 CIVIL 97-1589 (JAG)

23

2
3 which terms are applicable and correct cannot suffice to establish good faith efforts, just
4 as it cannot otherwise comply with AWP. Cf. Washington v. Miller, 721 F.2d at 801.
5 Rather AWP requires full disclosure of wage terms in writing such that the workers are
6 able to ascertain the rate at which they will be paid. See Escobar v. Baker, 814 F. Supp.
7 at 1504.

8 Defendants argue that, to the extent that the job orders identified the wage rate of
9 \$5.38 per hour and that they “also explained that in certain crops workers would be paid
10 a piece rate, but never less than \$5.38 per hour,” their AWP compliance is undisputed.⁴¹
11 Even assuming that plaintiffs had received any of the attachments to the job orders’ first
12 page, the attachment to the clearance order, which was in English—not a language common
13 to plaintiffs—listed over 25 different crops and over 30 specialized tasks with specialized
14 pay rates.⁴² Precedent is clear that such multitudinous enumerations of possibilities do not
15 meet the requirements of heightened specificity demanded by AWP’s 29 U.S.C. §
16 1821(a)(2).

17 ⁴¹See Docket No. 115, Defendants’ Memorandum for Summary Judgment, at 19.

18 ⁴²See id., Exhibit 1, Deposition of Ramón E. Toro Martínez, at 16, ll. 10-12; at 22,
19 ll. 14-16; at 25, ll. 19-25; at 39, ll. 12-15. At Puerto Rico Department of Labor’s Ponce
20 local office, workers were handed a summary of the job order’s first page and the work rules
21 in Spanish. The summary of the job order’s first page, however, only stated that the work
22 consists of the planting and recollection of “tobacco” and “vegetables,” at the “hourly pay
23 rate” of \$5.38, as well as in the reparation of fences and railings and installation and taking
24 down of irrigation systems. Exhibit 11; in San Germán’s local office, workers received a
25 summary of the job order’s first page which stated the pay rate for tobacco and hay and
26 straw at \$5.38 an hour and for cucumbers at \$0.70 cents per 5/8 bushel. In the section
27 describing the tasks, it included the recollection of tobacco, and mentioned watermelons
28 and asparagus, without specifying their pay rate. While in Arecibo, workers received a
summary of the job order’s first page which stated the pay rate for tobacco and hay and
straw at \$5.38 an hour and for cucumbers at \$0.70 cents per 5/8 bushel. However, their
tasks as to anything but tobacco were not at all, and those for tobacco were too general,
incomplete and inadequate. As to alternative forms of work, it stated that the workers
could be hired to do any type of agricultural work.

1 CIVIL 97-1589 (JAG)

24

2
3 As to the disclosures actually contained in the job orders' first page—or for that
4 matter, in their Spanish-language substitutes, such as the summary or the Agricultural
5 Work Agreement—, these were incomplete, inadequate, and otherwise incapable of
6 satisfying defendants' AWPAs obligations to any of the plaintiffs, even for those who
7 actually worked in tobacco and for those who had prior experience in tobacco.⁴³ See De
8 La Fuente v. Stokely-Van Camp, Inc., 713 F.2d at 237 (affirming district court's finding
9 that workers did not have actual notice, as required under AWPAs, from prior experience).

10 Based on their own admissions on the record, the defendants may not even assert
11 in their defense that, despite their most diligent good faith efforts, the specific wage each
12 worker could expect to receive was not ascertainable within the recruitment period.
13 According to NCGA's own Stan Eury, Jr., the data he, in his official capacity, used to fill
14 out the job orders' wage rate disclosures was obtained from the information provided to the
15 association by each individual grower about the crops each grew and the applicable wage
16 rates per crop and task.⁴⁴ Defendant NCGA therefore had to know, at the time the job
17 order was filed, the specific information applicable for each grower, for each crop, and for
18 each task, as well as how many workers were needed by each member, yet inexcusably
19

20
21

⁴³See Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibits
22 1, 11, and 12. Specifically, the job orders' disclosures, as well as those of the summaries,
23 were incomplete since they only provided information concerning the pay rates for tobacco,
24 cucumbers, and hay and straw and information only as to a fraction of the tasks expected
25 of the workers involved in the planting of tobacco. The Agricultural Work Agreement, as
26 well as the Attachment to ETA 790, had it been received by any of the plaintiffs, cannot
27 reasonably meet the AWPAs standards since it is simply a catalogue of possibilities that
28 leaves the worker to guess which terms are applicable and correct for himself. See
Washington v. Miller, 721 F.2d at 801.

⁴⁴See Docket No. 141, Plaintiffs' Opposition, Exhibit 1, deposition of Stanford Eury,
Jr., at 63, ll. 1-4.

1 CIVIL 97-1589 (JAG)

25

2
3 failed to adopt reasonable and effective business practices in order to comply with their
4 simple AWPAs obligations to each plaintiff.

5 Furthermore, given that the defendants' stated dates of need were listed as March
6 30 and April 11, the defendants must have known before the workers' April 19 and 20
7 arrivals which growers were cultivating which crops, what their needs for hand labor were,
8 and thus the pay rate workers could expect. In failing to ascertain and disclose this
9 information, NCGA disregarded plaintiffs' obvious economic needs and their right to
10 meaningfully and effectively choose where to work, in which crops, performing which tasks,
11 and for whom.⁴⁵

12 Defendants, whose burden it is to establish their good faith effort to ascertain
13 plaintiffs' wage rates and to timely disclose them, have not carried their burden. In view
14 of the above, I recommend that the motion for summary judgment in relation to
15 compliance by the defendants with 29 U.S.C. § 1821(a)(2) be DENIED.

16 (iv) Written Disclosures: Periods of Employment
17 (1) Starting Date of Need
18 a. Job Order No. 7930794

19 The first page of job order No. 7930794 identified the anticipated starting dates of
20 need as March 30, 1994 and April 11, 1994 and the ending date of need as November 1.
21 Plaintiffs, as United States citizens entitled to particular protections under AWPAs and the
22 pertinent federal regulations, question whether or not NCGA's stated dates of employment
23 were in fact true and accurate for any of its members, in particular of any of those who grew
24 the crops disclosed: tobacco, cucumbers, or hay and straw.

25 Plaintiffs' challenge is partly based on the fact that published statistics by the North
26 Carolina and United States Departments of Agriculture reveal that none of the planting

27 ⁴⁵See Docket No. 141, Plaintiffs' Opposition, Exhibit 8, United States Department
28 of Labor, Wage and Hour Opinion Letter, Opinion Letter 31,442, 1984.

CIVIL 97-1589 (JAG)

26

dates for the different tobacco belts found in North Carolina coincides with NCGA's March 30, 1994 stated date of employment.⁴⁶ Moreover, except in one case,⁴⁷ the defendants' own admissions at their depositions sufficiently support plaintiffs' contention that NCGA's disclosure of these dates of agricultural need was false and misleading, in violation of 29 U.S.C. § 1821(a)(4) and 29 U.S.C. § 1821(f).⁴⁸

⁴⁶See id., Exhibit 9. For reference purposes only, see NCGA's own documentation, which places the beginning of the anticipated work period for cucumbers around May 25 and for hay and straw, around June 1. See Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibit 1. Only the planting date for asparagus, April 1, identified in the Agricultural Work Agreement, coincides with the March 30 date. See id. Asparagus, however, was only mentioned as a possibility for those workers who were recruited by the San Germán, Puerto Rico Department of Labor's local office. See id., Exhibit 11.

⁴⁷In his deposition, defendant Elbert H. Dixon stated that he asked for the workers for the first of April. See Docket No. 141, Plaintiffs' Opposition, Exhibit 10, deposition of Elbert H. Dixon, at 32, l. 16.

⁴⁸In their depositions, defendants Ernest C. Evans, Sr., Rob Farmer, Steven Gray, James D. Johnson, Oscar Wayne Kelly, William D. Lee, T. Morris Murphy, Chester Pilson, and Steven W. Thomas, have represented that—either usually or in 1994—their tobacco farm labor needs start within days of April 15. See Docket No. 141, Plaintiffs' Opposition, Exhibit 10, deposition of Ernest C. Evans, at 17, ll. 8-13; deposition of Rob Farmer, at 24, ll. 1-7; deposition of Steven Gray, at 10, ll. 18-22; deposition of James D. Johnson, at 23, ll. 1-9, 19-22; deposition of Oscar Wayne Kelly, at 18, ll. 17-22; deposition of William D. Lee, at 10, ll. 1-6; deposition of T. Morris Murphy, at 14, ll. 11-12; deposition of T. Chester Pilson, at 19, ll. 15; deposition of Steven W. Thomas, at 11, ll. 22-24. Others defendants, such as Richard Canoy, Sr., John T. Dalrymple, Daniel Lee Nelson, and James Jeffrey Upchurch, have represented that they usually start planting tobacco during the last week of April—toward April 25—through May. See Plaintiffs' Exhibit 10, deposition of Richard Canoy, Sr., at 10, ll. 6-8; deposition of John T. Dalrymple, at 11, ll. 11-23; deposition of Daniel Lee Nelson, at 9, ll. 22-24; deposition of Bruce Robertson, at 10, ll. 15-20; deposition of James Jeffrey Upchurch, at 14, ll. 1-2. Defendant Kerry Venable contends that his tobacco planting operations take place between the second and third weeks of April through the second or third week in May. See deposition of Kerry Venable, at 12, ll. 18-20. Finally, defendants Kent Bennett, Dean Moore, Terry Neal, Bradford Todd Newsome, and Bruce Robertson have represented that they typically start transplanting tobacco around May 1. See id., Exhibit 10, deposition of Kent Bennett, at

CIVIL 97-1589 (JAG)

27

NCGA—through the deposition of its president Stan Eury, Jr.—alleges defendants’ compliance with AWPAs based on the unsupported assertion that the Department of Labor purportedly allows NCGA to write in two different starting dates because it “doesn’t materially change the terms and conditions of the job order”.⁴⁹ Yet, the report by the House of Representatives itself identified among AWPAs’ driving forces the Committee’s “... doubt on the ability of the Department of Labor to adequately enforce the [Act’s] provisions[.]” Regardless of whether or not the Department of Labor, or any of its divisions, properly and effectively enforces any of the obligations of agricultural contractors and employers, AWPAs provide that each and every farm labor contractor, employer and association which employs any migrant agricultural worker shall be responsible for the provision of the necessary information. 29 U.S.C. § 1821; see H.R. Rep. No. 97-885, at 14. Additionally, it has been explicitly established that no entity shall be permitted to insulate itself from such duty by hiring or delegating authority to an agent that communicates directly with the migrant workers. See H.R. Rep. No. 97-885, at 14. See also Leach v. Johnson, 812 F. Supp. 1198, 1210 (M.D. Fla. 1992).

Furthermore, once employers and labor contractors have disclosed, to the best of their abilities, their true and expected starting date, along with a required disclosure of the date’s tentative nature, they are permitted to go without additionally specifying all of the possible contingencies that may affect the starting date. Cf. Alvarez v. Joan of Arc, Inc., 658 F.2d at 1221. This obligation may be easily met by simply prefacing the date of need with the preposition “about” or by otherwise indicating that the dates are “tentative.” Id.

12, ll. 22-24; deposition of Dean Moore, at 14, ll. 21-24; deposition of Terry Neal, at 9, ll. 16-20; deposition of Bradford Todd Newsome, at 22, ll. 16-20; Exhibit 51, deposition of Bruce Robertson, at 27, ll. 12-24.

⁴⁹See Docket 141, Plaintiffs’ Opposition, Exhibit 1, deposition of Stanford Eury, Jr., at 72, l. 4.

1 CIVIL 97-1589 (JAG)

28

2
3 The first page of the job orders here in question, however, did not in any way
4 indicate that the starting dates were tentative or contingent on any factors. Neither did it
5 —or for that matter any of the other documents provided to the workers—specify
6 employment opportunities by employer or specify each employer's starting date of need.⁵⁰
7 Yet, defendants have themselves admitted that different growers would have very different
8 labor needs depending on the type of crop grown, the geographical part of the state, and
9 the specific time of the year.⁵¹ Because the association's members grew a wide diversity of
10 crops with an equally diverse array of potential planting and harvesting dates for each crop,
11 starting dates and the expected hours of work would necessarily affect a worker's decision
12 to respond to a job order according to his dates of availability and his opportunity to enjoy
13 work for a longer period of time.

14 In terms of job order No. 7930794, the defendants' motion for summary judgment
15 as to disclosure of the period of employment "in writing," accurately, intelligibly, and with
16 particularity to "each such worker" at the time of recruitment should therefore be
17 DENIED.

18 b. Job Order 7931086
19
20

21 ⁵⁰On the other hand, the Agricultural Work Agreement did provide a lengthy
22 catalogue list, breaking down the growing period by crop, though it did not do so by
23 employer and was not employee-specific. There is evidence in the record, however, that
tends to show that this document was not provided to all the workers and that those who
received it only obtained it when they were about ready to leave for North Carolina.

24 ⁵¹See Docket No. 115, Defendants' Memorandum for Summary Judgment,
25 deposition of Stanford Eury, Jr., at 79, ll. 12-20. Therein Mr. Eury states: "[Different
26 crops] could have varying harvesting methods. Some people may do once over. Some
27 people may pick them twice. Some people may have mechanical harvesting aids, some
28 people may not. Different technologies employed, different crop conditions, a bumper crop
versus a very poor crop. And that can vary from geographical state —part of the state year
to year."

CIVIL 97-1589 (JAG)

29

The first page of job order No. 7931086 identified the anticipated starting date of need as June 13, 1994 and the ending date of need as November 1. Without offering any kind of supporting meteorological evidence, defendants' contend that the June 13 date was changed to July 1, 1994 due to unusually cold weather conditions.⁵²

Plaintiffs, however, have offered sufficient evidence that, in 1994, the State of North Carolina experienced degrees in temperatures warmer or about the same as other.⁵³

Whether or not the defendants were justified in charging the starting date of employment and whether or not they violated 29 U.S.C. § 1822(c) is a genuine issue of material fact. I therefore recommend that the motion for summary judgment as to this issue be DENIED.

(2) Anticipated Hours of Work

As filled out by NCGA,⁵⁴ the job order's section 10 on anticipated hours of work specified that the workers could expect employment of 40 hours per week.⁵⁵ Defendants never informed plaintiffs, either through documents or during the NCGA interviews, that

⁵²See Docket No. 115, Defendants' Memorandum for Summary Judgment, at 19; Exhibit 7, where Mr. Harry Lee Wicker, Jr., from the North Carolina Employment Security Commission, stated to the United States Department of Labor that its organization had been informed by NCGA that due to "record cold temperatures in combination with less than average rainfall will delay crop activities requiring hand labor for two weeks."

⁵³See Docket No. 141, Plaintiffs' Opposition, Exhibit 3.

⁵⁴It was Stan Eury, Jr.'s function, as well as that of Kenneth W. White, to actually write the clearance orders and check them for accuracy. See Docket No. 141, Plaintiffs' Opposition, Exhibit 1, deposition of Stanford Eury, Jr., at 63, ll. 1-4. The information used in NCGA's process of filling out and submitting the job orders was obtained from the information provided to them by the growers about the number of workers they needed, the crops they grew, and their dates of need. *Id.* In addition, Mr. White's functions included the dissemination of information concerning the applicable federal and state regulations. See *id.* at 54, ll. 11-15.

⁵⁵See Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibit

1 CIVIL 97-1589 (JAG)

30

2
3 there would be lengthy periods in which little or no work would be available, even though
4 defendants admit that they knew, at the time of recruitment, that such periods were
5 expected and needed to be disclosed.⁵⁶

6 On the contrary, the deposition of the Puerto Rico Department of Labor's Mateo
7 Vélez Sánchez supports the idea that workers were misled into believing they could expect
8 to work 160 hours a month.⁵⁷ NCGA's alleged misrepresentation as to the quantity and
9 frequency of work and as to the known possibility that work would become scarce or none
10 existent at certain points during the season would have thus frustrated the statute's intent
11 to "ensure that workers [would] to the greatest possible extent have full information about
12 ... what the conditions [would] be when they arrive[d]." See H.R. Rep. No. 97-885, at 14.
13

14 ⁵⁶See Docket No. 141, Plaintiffs' Opposition, Exhibit 10, deposition of Bradford
15 Todd Newsome, at 23, (stating that for two to four weeks there would be no work); *id.*,
16 Exhibit 13, deposition of Oscar Wayne Kelly, at 14, ll. 2-19 (there was a period of about
17 three to five weeks when workers had little work to do, when they were not doing the
18 fulltime, 40 hours per week, but rather half of that); deposition of John T. Dalrymple, at
19 34, ll. 10-12; at 35, ll. 8-11 (after setting the crops, there was a period of four to five weeks
20 when there wasn't enough work for the crew); deposition of Raymond W. Foster, at 16, ll.
21 3-4, 6-9 (for about three to four weeks after planting tobacco, there is not a lot of work to
22 do, except for clearing rocks and weeding); deposition of Robert E. Farmer, at 36, ll. 10-22
23 (every year for about two to three weeks after planting tobacco, there is a period of little
24 or no work, when he provides work to the men on chopping bushes around ponds and
25 irrigating); Exhibit 51, deposition of Bruce Robertson, at 27, ll. 7-10, 12-14, 19-23; at 28,
26 l. 1 (there would be approximately two weeks of down time after planting and before
27 cultivating, during which defendant Robertson provides nothing to do, because "I am not
28 going to make them a job"); Exhibit 52, deposition of T. Morris Murphy, at 42, ll. 9-24,
(there were expected periods of about two to three weeks past mid May when there was
little or no work. In 1994, during this period, plaintiff Rafael Vélez worked "at least one
day" in the hog house.); *see also* Exhibit 16, deposition of [plaintiff] Edson Cupeles Rivera,
at 105, ll. 2-4 (he spent about three weeks without work until he found a job working for
a "nursery" for \$4.25 an hour, \$1.13 less than the guaranteed wage of \$5.38 hour).

⁵⁷See Docket No. 141, Plaintiffs' Opposition, Exhibit 5, deposition of Mateo Vélez
Sánchez, at 118, ll. 7-18.

1 CIVIL 97-1589 (JAG)

31

2
3 Defendants' alleged failure to disclose the anticipated hours of employment may
4 have lead at least some plaintiffs to choose the NCGA clearance order over seemingly
5 shorter job opportunities.⁵⁸ Since AWPAs requires, without exception, the written
6 disclosure of this material term of the working arrangement, defendants' disclosure was
7 thus incomplete and inadequate, even as to those plaintiffs who had prior experience in
8 tobacco. See De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d at 237. Therefore, I
9 recommend that the motion for summary judgment as to this issue be DENIED.

10 C) Disparate Treatment

11 The Immigration Reform and Control Act (1986) codifies certain aspects of the
12 current H-2A (non-immigrant temporary foreign agricultural workers) scheme relevant to
13 the present application of AWPAs.⁵⁹ See 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), (b), and 1188.
14 Under this statutory scheme, agricultural employers who anticipate temporary domestic
15 labor shortages may petition the Attorney General for authorization to utilize non-
16 immigrant temporary foreign agricultural workers. See 8 U.S.C. § 1188(a)(1); 20 C.F.R.
17 § 655.101; Vega v. Nourse Farms, Inc., 62 F. Supp. 2d 334, 335-38 (D. Mass. 1999) (for
18 a thorough discussion of the H-2A program); see also Donaldson v. United States Dep't.
19 of Labor, 930 F.2d 339, 341-42 (4th Cir. 1991) (discussing the H-2A program). Prior to
20 the Attorney General's approval, the employer must successfully apply to the Secretary of
21 the United States Department of Labor for certification that (A) there are not sufficient
22 domestic workers who are able, willing, and qualified, and who will be available at the time
23 and place needed and (B) the employment of foreign workers will not adversely affect the
24

25 ⁵⁸See id., Exhibit 17, transcript of phone interview between Jay Hill and Edson
26 Cupeles Rivera (where plaintiff states he believed the NCGA job offer would pay better
because it entailed a longer period of employment).

27 ⁵⁹The pertinent H-2A regulations are contained in 20 C.F.R. § 655.90 through §
28 655.113. Section 655.90(a)(2) sets forth the requirements and procedures for certification
by employers seeking H-2A workers.

1 CIVIL 97-1589 (JAG)

32

2
3 wages and working conditions of United States workers similarly employed. See 20 C.F.R.
4 § 655.90. Absent a showing of both preconditions, a certification shall not issue. See 8
5 U.S.C. § 1188(a)(1); 20 C.F.R. § 655.90(b)(2).

6 An agricultural employer must submit said application less than 60 days prior to the
7 employer's expected first day of need, along with a "job offer" that sets forth all the
8 material terms and conditions of employment, including wages, working conditions, and
9 benefits. See 20 C.F.R. §§ 655.100(a)(1), (b); § 655.101(b)(1); § 655.102. Pursuant to
10 the Wagner-Peyser Act, 29 U.S.C. § 49 et seq., when the supply of local United States
11 workers is insufficient, the employer's job offer is used to recruit United States workers
12 around the Nation through an interstate clearance system. See 20 C.F.R. § 655.101(c)(4).
13 See also 20 C.F.R. §§ 652.1 et seq. (implementing the Wagner-Peyser Act) and §§ 653.500
14 et seq. (setting forth the requirements for acceptance and handling of intrastate and
15 interstate job clearance orders seeking agricultural workers).

16 Though an employer's recruitment efforts of United States workers need only extend
17 until the date when the H-2A workers depart for the employer's place of employment,
18 agricultural employers have certain obligations to United States citizen workers up until
19 fifty percent of the work contract has elapsed. See 8 U.S.C. § 1188(b)(b); 20 C.F.R. §
20 655.103(e) and § 655.105. This obligation, known as the "fifty-percent rule," requires that
21 an employer provide employment to any qualified United States applicant until fifty
22 percent of the contractual period of employment in which H-2A workers are utilized has
23 elapsed. See 20 C.F.R. § 655.103(e); 8 U.S.C. § 1188(c)(2)(B)(i). If employment of
24 United States workers results in the displacement of non-citizen H-2A workers, the
25 employer is exonerated from his employment obligations to the displaced worker. See 8
26 U.S.C. § 1188(c)(2)(B)(6); 20 C.F.R. § 655.102(b)(6)(iv) and § 655.103(e).

27

28

1 CIVIL 97-1589 (JAG)

33

2
3
4 An exception to the fifty-percent rule allows agricultural associations to “refer or
5 transfer workers among its members,” if such referral does not result in the disparate
6 treatment of United States workers. See 8 U.S.C. §§ 1188(c)(3)(B)(iv) and (v); 20 C.F.R.
7 § 655.106(c). Clearly, an association’s choice to transfer or refer United States workers
8 does not automatically violate the rights of United States citizens. However, this exception
9 plainly allows for the transfer of H-2A workers—which may, on occasion, be particularly
10 advisable so as to avoid the abovementioned disparate treatment of United States workers.
11 Cf. Vega v. Nourse Farms, Inc., 62 F. Supp. 2d at 337. A preference for the transfer of H-
12 2A workers in order to avoid the detriment of United States citizens’ working conditions
13 would be predicated on the pronouncement that the “obvious point” of this H-2A statutory
14 and regulatory framework is to ensure the preferential treatment of United States workers
15 over foreign labor. See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez, 458 U.S.
16 592, 596 (1982).

17 At a minimum, the defendants—as AWPAs agricultural employers—were bound
18 required to provide to plaintiffs, and all other United States citizens, “no less than the
19 same benefits, wages, and working conditions which the employer is offering, intends to
20 offer, or will provide to H-2A workers.”⁶⁰ See 20 C.F.R. § 655.102(a). With regards to the
21 placement of United States workers for working assignments among an association’s grower
22 member, plaintiffs have supported their disparate treatment claim on the Department of
23 Labor’s determination that

24 in situations where employers are successful in recruiting foreign workers from
25 the same communities or the same families in order to place them together
at job sites in the U.S. and thereby promote a more stable and positive
working environment fostered by mutual support and personal relationship

26 ⁶⁰Following Congressional intent, under AWPAs and other related statutes, the word
27 “or,” when used in the context of a list of activities giving rise to AWPAs obligations, should
28 be interpreted as meaning any one or all of the activities listed. Cf. Leach v. Johnson, 812
F. Supp. at 1206.

1 CIVIL 97-1589 (JAG)

34

2
3 of the foreign workers, failure to provide the same environment for U.S.
4 workers would constitute disparate treatment under the law. Under such
5 circumstances, associations would not be permitted to break up and disperse
6 crews of U.S. workers among different employers.⁶¹

7 In such situations, questions may arise as to a defendant's intention to place foreign
8 workers together at job sites in the United States and thereby promote a more stable and
9 positive working environment. However, since under AWPAs there is no requirement for
10 specific intent, a defendant will be held liable for the natural consequences of his voluntary
11 acts. De la Fuente v. Stokely-Van Camp, Inc., 713 F.2d at 238 (under AWPAs's less
12 stringent predecessor, FLCRA); Rivera v. Adams Packing Ass'n, Inc., 707 F.2d 1278, 1283
13 (11th Cir. 1983) (FLCRA); Alvarez v. Longboy, 697 F.2d 1333, 1338 (9th Cir. 1983);
14 Alvarez v. Joan of Arc, 658 F.2d at 1224; Campbell v. Miller, 836 F. Supp. 827, 830 (M.D.
15 Fla. 1993); Howard v. Malcolm, 658 F. Supp. at 434-35; DeLeón v. Ramírez, 465 F. Supp.
16 698, 705 (S.D.N.Y. 1979) (FLCRA). See also Sánchez v. Overmyer, 845 F. Supp. at 1192
17 (if operating in violation of AWPAs is a defendant's normal business practice, violations are
18 considered intentional); Stewart v. Everett, 804 F. Supp. 1494, 1497-98 (M.D. Fla. 1992).

19 According to plaintiffs, the defendants had the prevailing business practice, regarding
20 their temporary foreign workers from Mexico, of frequently assigning family and friends
21 from the same community to live and work together. Plaintiffs, as United States citizens,
22 would have been entitled to the same working arrangements ultimately provided to the
23 non-immigrant foreign co-workers. See 20 C.F.R. § 655.102(a). Plaintiffs have presented
24 sufficient evidence to substantiate their contention that the defendants knew about their

25
26 ⁶¹See Docket No. 141, Plaintiffs' Opposition, Exhibit 31, Field Memorandum No.
27 42-94, "H-2A Agricultural Issues Requiring Special Attention," from Barbara Ann Farmer,
28 Administrator for Regional Management, Department of Labor-ETA, April 13, 1994,
attached to fax transmission from Daniel L. Lowry, Regional Administrator (GA), to Stan
Eury, President, NCGA, April 15, 1994, at 3, ¶ 4(B)(1)(b)(ii).

1 CIVIL 97-1589 (JAG)

35

2
3 obligations,⁶² that the defendant knew about plaintiffs' desire to remain with family and
4 friends from the same community of origin, and that the defendants had lead the Puerto
5 Rico Department of Labor to believe that such requests would be honored.⁶³

6 ⁶²Defendants may be found to have intentionally violated AWPA even if they lacked
7 knowledge of the plaintiffs' rights and their obligations. See Leach v. Johnson, 812 F.
8 Supp. at 1208.

9 ⁶³According to Eileen Ramírez Colón, she had communicated with Charles Dubosse,
10 from the Department of Labor's Monitor Advocate for Region II in New York State and
11 had expressed certain workers' desires to be placed together. See Docket No. 115,
12 Defendants' Memorandum for Summary Judgment, deposition of Eileen Ramírez Colón,
13 at 140, ll. 1-5; see also Docket No. 141, Plaintiffs' Opposition, Exhibit 4, deposition of
14 Eileen Ramírez Colón, at 82, ll. 1-19; Exhibit 5, deposition of Mateo Vélez Sánchez, at 82,
15 ll. 18-25; at 83, l. 1. Plaintiff Heriberto Alvarez Rosa, along with five
16 individuals—including three of his brothers and two of his friends—, left together for North
17 Carolina with the intention of working together, having already expressed their desire to
18 be hired as a crew. See Docket No. 141, Plaintiffs' Opposition, Exhibit 45, deposition of
19 Heriberto Alvarez Rosa, at 21, ll. 1-17; at 22, ll. 1-6, 12-14. Plaintiff Efraín Alvarez Rosa,
20 who communicated to NCGA his desire to be assigned with friends and family, was told
21 by a Spanish-speaking NCGA representative that Puerto Rican workers had to be assigned
22 separately. See Docket No. 141, Plaintiffs' Opposition, Exhibit 22, deposition of Efraín
23 Alvarez Rosa, at 59, ll. 1-2, ll. 13-15; at 60, ll. 3-5. Puerto Rico Department of Labor,
24 based on representations of NCGA's Stan Eury, Jr., gave assurances to plaintiffs Santiago
25 López Morales, José Luis López Morales, José Ponce, and Teodoro Cabrera, who were
26 interviewed together, that they would be assigned together once they got to North
27 Carolina. See Docket No. 141, Plaintiffs' Opposition, Exhibit 5, at 65; Exhibit 38,
28 deposition of Santiago López Morales, at 20, ll. 9-11, 23-25; at 21, ll. 1-2, 10, 8; at 25, ll.
9-11. Plaintiff David Orengo Pacheco spoke directly with Puerto Rico Department of
Labor's Lizette Vélez as a representative of his group—consisting of himself, his brother in
law, Miguel Camacho, Manuel Vega, Israel Martínez Aponte, Radamés Pacheco
(Mr. Martínez Aponte's brother-in-law), Darwin Pagán (not a plaintiff), and George Acosta
(not a plaintiff)—to communicate their wish to be assigned together, which they restated
at each of their subsequent meetings. See Docket No. 141, Plaintiffs' Opposition, Exhibit
40, deposition of David Orengo Pacheco, at 53, ll. 8-9, 14-15; at 54, l. 3; Exhibit 41,
deposition of Israel Martínez Aponte, at 56, ll. 16-25; at 57, ll. 5-12; Exhibit 42, deposition
of George Acosta López, at 20, ll. 9-13; at 21, ll. 7-8, 20-21; at 33, ll. 3-4, 11-12. Puerto
Rico Department of Labor staff assured them it would be possible but that, in order to
guarantee that their wish would be honored, they needed to reassert their wish to the

1 CIVIL 97-1589 (JAG)

36

2
3 For instance, on April 15, 1994, five days before the arrival of the Puerto Rican
4 workers, NCGA's Stan Eury, received through fax transmission, a copy of Field
5 Memorandum 42-94 from the United States Department of Labor ETA Regional
6 Administrator Daniel Lowry.⁶⁴ Had the defendant lacked knowledge of the law, this
7 Department of Labor transmission would have unequivocally informed NCGA that
8 "[United States] workers have the right to be referred to an employer who has sufficient
9 job opportunities to accommodate the entire group when such an employer exists."⁶⁵
10 NCGA, however, deliberately disregarded the workers' rights, as well as the Department
11 of Labor's mandate. Neither appears to have produced any effect upon the way in which
12 NCGA assigned the Puerto Rican workers when they arrived.⁶⁶ Instead, the defendants
13 assumed the position that, since the Puerto Rican workers would reach North Carolina
14

15
16 employers when they got to North Carolina. See Docket No. 141, Plaintiffs' Opposition,
17 Exhibit 41, deposition of Israel Martínez Aponte, at 57, ll. 18-19; at 58, ll. 13-15. Once
18 there, however, the Puerto Rican workers found themselves surrounded by a significant
19 number of police officers, wearing bulletproof vests and yielding guns. See Docket No.
20 141, Plaintiffs' Opposition, Exhibit 41, deposition of Israel Martínez Aponte, at 66, ll. 4-
21 11; Exhibit 42, deposition of George Acosta López, at 37, ll. 7-25. It was within this
22 context, and having been told twice that NCGA representatives had stated that the groups
23 would not be allowed to stay together, that plaintiffs failed to reassert their wish because
24 they were told that. See Docket No. 141, Plaintiffs' Opposition, Exhibit 42, deposition of
25 George Acosta López, at 33, ll. 13-22; Exhibit 41, deposition of Israel Martínez Aponte,
26 at 60, ll. 8-11.

27 ⁶⁴See Docket 141, Plaintiffs' Opposition, Exhibit 31, Field Memorandum No. 42-94,
28 "H-2A Agricultural Issues Requiring Special Attention," from Barbara Ann Farmer,
Administrator for Regional Management, Department of Labor, ETA, April 13, 1994,
attached to fax transmission from Daniel L. Lowry, Regional Administrator (GA), to Stan
Eury, Pres. NCGA, April 15, 1994.

⁶⁵See *id.*, fax transmission from Daniel L. Lowry, Regional Administrator (GA), to
Stan Eury, President NCGA, April 15, 1994.

⁶⁶See *id.*, Exhibit 1, deposition of Stanford Eury, Jr., at 201, ll. 19-23.

1 CIVIL 97-1589 (JAG)

37

2
3 after the H-2A workers had arrived and been assigned, their rights could be relinquished
4 and subordinated.

5 As early as April 19, 1994, in a letter to the United States Department of Labor,
6 ETA Regional Administrator Daniel Lowry, Mr. Eury states:

7 As I am sure you are aware, the current work period covered by NCGA
8 clearance order already is underway, and the H-2A workers are on site.
9 Therefore, any U.S. workers who apply now—such as the Puerto Ricans
10 scheduled to arrive this week—will be coming in under the ‘fifty-percent rule’
set forth at § 655.103(e).⁶⁷

11 Regardless of NCGA’s interpretation of the federal regulations, there is no evidence
12 that any Puerto Rican worker arriving on April 19 and April 20, 1994 applied “after the
13 time the foreign workers [had] depart[ed] for the employer’s place of employment” such
14 that they would come under the “fifty-percent rule.” (Emphasis added.) Without
15 information as to the date on which each plaintiff applied for the job and without knowing
16 the date on which the H-2A workers departed for each place of employment, the
17 applicability of the “fifty-percent rule” is unascertainable. Unless the defendants can
18 present credible evidence to support its relevance and application, there is no reason to
19 entertain this issue. NCGA’s position regarding United States workers may very well prove
20 “unreasonable,” “unwarranted,” and discriminatory, particularly given (1) the statutory and
21 regulatory preference for United States workers, (2) the ultimate reality—whether
22 purposefully or not—that defendants did provide their Mexican H-2A workers with
23 accommodations reflecting their familial and community ties,⁶⁸ and (3) the defendants’

24 ⁶⁷See id., Exhibit 33, attached correspondence from NCGA’s Stan Eury, Jr.,
25 President, to United States Department of Labor ETA Regional Administrator Daniel
26 Lowry, letter at 2 (emphasis added). See also Docket No. 115, Defendants’ Memorandum
27 for Summary Judgment, deposition of Stanford Eury, Jr., at 204, ll. 1-6 (stating that “These
workers were arriving after starting dates, during the 50-percent rule; and, of course, the
rules for referral are much different after 50 percent than prior.”).

28 ⁶⁸See Docket No. 141, Plaintiffs Opposition, Exhibit 35.

CIVIL 97-1589 (JAG)

38

obligation to provide United States citizens with “no less than the same benefits, wages, and working conditions which the employer is offering, intends to offer, or will provide to H-2A workers.”⁶⁹ Defendants’ claim is particularly weak given plaintiffs’ sworn statements that at least two grower members had not yet received the H-2A workers when the plaintiff workers were distributed among NCGA members.⁷⁰

Plaintiffs have also predicated their disparate treatment claim on the Department of Labor’s interpretation of the defendants’ obligations under 20 C.F.R. § 655.102(a) and § 655.103(e):

⁶⁹See 20 C.F.R. § 655.102(a). In reaching this conclusion, I also consider the alleged controversy regarding plaintiffs’ travel accommodations. According to Puerto Rico Department of Labor’s Eileen Ramírez Colón, starting on March 23, 1994, the Puerto Rico Department of Labor staff had a series of disagreements with NCGA’s Stan Eury, who refused to cooperate with their efforts to procure the earliest, cheapest, and closest flight. See Docket No. 141, Plaintiffs’ Opposition, Exhibit 4, deposition of Eileen Ramírez Colón, at 85-96. According to Ms. Ramírez Colón, it was solely because the Puerto Rico Department of Labor “was waiting for the arrangements with Mr. Eury” that the Puerto Rican workers were unable to leave for North Carolina sooner than April 19 and 20. *Id.*, at 95, ll. 4-8. In addition, the deposition testimony of Puerto Rico Department of Labor’s Mateo Vélez Sánchez stating that “when we got there my guys were sitting down, not making enough money to eat, while [foreigner workers] were working eight hours a day” raises a substantial question as to the possibility of less favorable, disparate treatment of United States citizens regarding their day-to-day work assignments in contravention of 8 U.S.C. §§ 1188(c)(3)(B)(iv) and (v) and 20 C.F.R. § 655.103(e). See Docket No. 141, Plaintiffs’ Opposition, Exhibit 5, deposition of Mateo Vélez Sánchez, at 115-117, 119. See also Exhibit 39, deposition of José Luis López Morales, at 65, ll. 1-3, 5, 11 (stating that there were days when United States workers from Puerto Rico would not have any work while the H-2A workers worked on).

⁷⁰See Docket No. 141, Plaintiffs Opposition, Exhibit 39, deposition of José Luis López Morales, at 65, ll. 11-15 (stating that the H-2A workers arrived at defendant Bennett’s place of employment after the Puerto Rican workers); Exhibit 59, subdivision b, interrogatories of Carlos G. Pérez (stating that he was among the first workers to arrive to the camp of Hursel Johnson and that there was housing vacancies on the house where he stayed).

CIVIL 97-1589 (JAG)

39

If individual members of an association are able to absorb an entire crew of qualified and available U.S. workers without exceeding stated labor needs, failure on the part of the association to place the workers as a crew would be considered to be in contradiction with regulatory requirements concerning the hiring of U.S. workers. If the crew and its members wish to be placed as a group, and there are sufficient openings with one or more employer members of an association to accommodate group placement, the association would be required to place the entire crew with the appropriate employer. It would not be permissible to allow the association to break up the crew and offer to place the workers among several employers.⁷¹

Unless the defendants can establish that their refusal to so assign United States workers as a crew was based either on the verifiable lack of qualifications of the available United States workers⁷² or on the verifiable fact that the association's grower members were unable to comply with this mandate without exceeding their stated labor needs, failure to have done so "would constitute a violation of the labor certification and the job order[.]"⁷³

⁷¹See Docket No. 141, Plaintiffs' Opposition, Exhibit 31, Field Memorandum No. 42-94, "H-2A Agricultural Issues Requiring Special Attention," from Barbara Ann Farmer, Administrator for Regional Management, Department of Labor, ETA, April 13, 1994, attached to fax transmission from Daniel L. Lowry, Regional Administrator, (GA), to Stan Eury, President, NCGA, April 15, 1994, ¶ 4(B)(1)(b)(ii), at 2-3.

⁷²See Docket No. 141, Plaintiffs' Opposition, Exhibit 17, NCGA telephone interview of David Orengo (tobacco experience in Connecticut and South Carolina); Alfredo Nazario (was not asked about agricultural experience); Juan González Gauthier (experience in agriculture, not asked about experience in tobacco); Manuel Vélez García (tobacco experience in Connecticut); Rafael Vélez (agricultural experience, not asked about experience in tobacco); Edson Cupeles Rivera (tobacco experience in Connecticut).

⁷³See *id.*, Exhibit 31. Though defendants attempt to predicate their entitlement to summary judgment as to this issue on Title VII procedural safeguards, plaintiffs' alleged failure to exhaust these administrative remedies is immaterial to their claims. Plaintiffs have at not raised the possibility of seeking Title VII remedies. Moreover, following the Department of Labor's determination that defendants' reluctance to conform to the regulations would constitute a violation of the job offer, this court may continue to construe plaintiffs' complaints as grounded and governed by the principles of breach of contract.

CIVIL 97-1589 (JAG)

40

In view of the above, I recommend that the motion for summary judgment as to the issue of disparate treatment be DENIED.

D) Individual Claims

(i) Pesticide Exposure

Plaintiffs Roberto Christian, Heriberto Cruz Vega, Juan García Carrero, Wilfredo González, José González Gauthier, Manuel Vega García, Edson Cupeles Rivera, and Luis Hernández Meléndez claim that they were exposed to pesticides during their employment with the defendants, in violation of their working arrangement.⁷⁴ Plaintiffs argue that they are entitled to damages for emotional distress resulting from the defendants' alleged violation of 40 C.F.R. § 170.112(a)(1)⁷⁵ of the Worker Protection Standard, under the Environmental Protection Act, 7 U.S.C. § 136w. See Soto v. Jurado, 166 F.3d 1222 (10th Cir. 1998), (affirming lower court's award for emotional distress as part of compensatory damages); Martínez v. Shinn, 992 F.2d 997, 1001 (9th Cir. 1993) (affirming lower court's emotional distress award under AWPAs for retaliatory termination of employment).

⁷⁴See id., Exhibit 84, deposition of Juan García Carrero, at 48; ll. 11-25; at 49 (discussing pesticide exposure while working for defendant Upchurch); deposition of Manuel Vega García, at 29, ll. 22-25; at 65, ll. 21-25; at 66; at 67, ll. 1-17 (same, while working for defendant Butter); deposition of Heriberto Cruz Vega, at 102, ll. 23-24; at 103-108; deposition of José González Gauthier, at 54 (same, while working for defendant Aycock); deposition of Roberto Christian, at 118, ll. 18-24; at 119; at 120, ll. 1-18 (same, while working for defendant Rosser); Exhibit 85, First Set of Interrogatories, Luis Hernández Meléndez, at 4 (answer to question 3) (pesticide exposure while working for defendant Ross); Edson Cupeles Rivera, at 8 (answer to question 18) (same, while working for defendant Dalrymple).

⁷⁵Title 40 C.F.R. § 170.112(a)(1) states that "[a]fter the application of any pesticide on an agricultural establishment, the agricultural employer shall not allow or direct any worker to enter or to remain in the treated area before the restricted-entry interval specified on the pesticide labeling has expired, except as provided in this section.

1 CIVIL 97-1589 (JAG)

41

2
3
4 Defendants, however, deny both that any workers were improperly exposed to
5 pesticide poisoning and that any worker would be entitled to relief for such exposure.
6 Defendants contend that the exclusive remedy available to the workers would have been
7 the filing of a workers' compensation claim. They argue that their position is supported
8 by the exclusivity provision of 29 U.S.C. 1854(d)(1).⁷⁶ See Deck v. Peter Romein's Sons,
9 Inc., 109 F.3d 383, 389 (7th Cir. 1997). However, their argument ignores that plaintiffs'
10 claims for emotional distress are distinguishable from claims for physical injuries under the
11 pertinent workers' compensation statute. Such claims are neither "provided for" or
12 otherwise compensable under North Carolina's Workers' Compensation Act,⁷⁷ nor barred
13 by its provisions. See 29 U.S.C. 1854(d)(1); Hogan v. Forsyth Country Club Co., 340 S.E.
14 2d 116, 120-121 (N.C. App. 1986). It disregards that the exclusive remedy prescribed by
15 section 1854(d)(1) does not preclude recovery for statutory damages or equitable relief so
16 long as these do not affect recovery under the state workers' compensation law or the rights

17
18
19
20
21 ⁷⁶Title 29 U.S.C. 1854(d)(1) reads

22 Notwithstanding any other provision of this chapter, where a State workers'
23 compensation law is applicable and coverage is provided for a migrant or
24 seasonal agricultural worker, the workers' compensation benefits shall be the
25 exclusive remedy for loss of such worker under this chapter in the case of
26 bodily injury or death in accordance with such State's workers' compensation
27 law.

28 ⁷⁷Regardless of whether or not this document was ever received by plaintiffs,
according to defendants' Attachment to ETA 790, at 12, workers would be covered "by the
North Carolina Worker's (sic) Compensation Insurance or equivalent employer provided
insurance for injuries arising out of and in the course of employment." Docket No. 115,
Defendants' Memorandum for Summary Judgment, Exhibit 1.

1 CIVIL 97-1589 (JAG)

42

2
3 under such.⁷⁸ Defendants ignore the fact that plaintiffs are attempting to recover for
4 violations of the terms of their working arrangements under 29 U.S.C. § 1822(c).

5 Plaintiffs' claims for an award of damages for emotional distress are therefore
6 supported by AWPAs. I therefore recommend that the motion for summary judgment in
7 relation to this issue be DENIED.

8 (ii) Housing

9 Section 1823(a) stipulates that

10 each person who owns or controls a facility or real property which is used as
11 housing for migrant agricultural workers shall be responsible for ensuring that
12 the facility or real property complies with substantive Federal and State safety
13 and health standards applicable to that housing.

14 In addition, subparagraph (b)(1) states that certification does not relieve any such
15 person of their responsibilities under subsection (a). See 29 U.S.C. §§ 1823(a) and (b)(1).

16 Plaintiffs allege that the defendants failed to provide them with housing facilities and
17 to maintain them in compliance with the substantial standards expected under AWPAs. In
18 particular, plaintiffs have introduced evidence accusing the defendants of, *inter alia*,
19 providing unsanitary mattresses in violation of 29 C.F.R. § 1910.142(b)(3) and/or the
20 North Carolina Migrant Housing Act, N.C. Gen. Stat. § 95-129⁷⁹; failing to provide hot

21 ⁷⁸See 29 U.S.C. § 1854(d)(2), stating that

22 The exclusive remedy prescribed by paragraph (1) precludes the recovery
23 under subsection (c) of this section of actual damages for loss from an injury
24 or death but does not preclude recovery under subsection (c) of this section
25 for statutory damages or equitable relief, except that such relief shall not
include back or front pay or in any manner, directly or indirectly, expand or
otherwise alter or affect (A) a recovery under a State workers' compensation
law or (B) rights conferred under a State workers' compensation law.

26 ⁷⁹N.C. Gen. Stat. § 95-129(2) reads "Each employer shall comply with occupational
27 safety and health standards or regulations promulgated pursuant to this article." See also
28 N.C. Gen. Stat. § 95-225(a), which stipulates that, "Unless otherwise provided, all
established federal standards are adopted and shall be enforced by the Department of Labor

1 CIVIL 97-1589 (JAG)

43

2

3

4

5 of North Carolina.” See, e.g., Docket No. 141, Plaintiffs’ Opposition, Exhibit 59, First Set
 6 of Interrogatories, Baltazar Ortiz Correa, (answer to question 21) (while working for
 7 defendant Chester Pilsen); First Set of Interrogatories, Carlos Pérez Adames, (answer to
 8 question 21) (while working for defendant Hursel Johnson); First Set of Interrogatories,
 9 Héctor Pérez Soto, (answer to question 21) (while working for Hursel Johnson); First Set
 10 of Interrogatories, Gabriel Ramos Rojas, (answer to question 21)(while working for Hursel
 11 Johnson); deposition of Gabriel Ramos Rojas, at 64, ll. 6-12 (while working for Hursel
 12 Johnson); First Set of Interrogatories, Radamés Pacheco, (answer to question 21) (while
 13 working for Nelson Phillips); First Set of Interrogatories, Darío Llantín Lugo, (answer to
 14 question 21) (while working for Nelson Phillips); deposition of Darío Llantín Lugo, at 66,
 15 ll. 22-23 (while working for Nelson Phillips); First Set of Interrogatories, Domingo Colón
 16 Ayala, (answer to question 21) (while working for Bobby Ham); First Set of Interrogatories,
 17 Juan Vélez Serrano, (answer to question 21) (while working for Bobby Ham); First Set of
 18 Interrogatories, Jesús Barreto Bermúdez, (answer to question 21) (while working for Bobby
 19 Ham); First Set of Interrogatories, Pedro Sánchez Díaz, (answer to question 21) (while
 20 working for Bobby Ham); deposition of Saturnino Medina Avilés, (while working for Bobby
 21 Ham); First Set of Interrogatories, Edwin Echevarría, (answer to question 21) (while
 22 working for Dennis Smith); First Set of Interrogatories, Richard Rivera Flores, (answer to
 23 question 21) (while working for Dennis Smith); First Set of Interrogatories, Edwin Febus
 24 Rivera, (answer to questions 20-21) (while working for Jimmy Ross); First Set of
 25 Interrogatories, Luis Hernández Meléndez, (answer to questions 20-21) (while working for
 26 Jimmy Ross); First Set of Interrogatories, Louis González Gauthier, (answer to question 21)
 27 (while working for Phil Aycock); deposition of Louis González Gauthier, at 26, ll. 10-17;
 28 First Set of Interrogatories, Juan González Gauthier, (answer to question 21) (while
 working for Phil Aycock); deposition of Juan (José) González Gauthier, at 45, ll. 1-3; at 68,
 ll. 15-16; First Set of Interrogatories, Luis Angel Alvarez Rosa, (answer to question 21)
 (while working for Ricky Carter); deposition of Luis Angel Alvarez Rosa, at 79, ll. 8-12;
 deposition of Heriberto Alvarez Rosa, at 38, ll. 16-25; at 39, ll. 1-10 (while working for
 Ricky Carter); First Set of Interrogatories, Israel Martínez Aponte, (answer to question 20)
 (while working for Jarvis McDonald); First Set of Interrogatories, Ricardo Matos Caraballo,
 (answer to questions 20-21) (while working for Larry Eason); First Set of Interrogatories,
 Jesús Rivas Rosado, (answer to question 21) (while working for Cabell Early); First Set of
 Interrogatories, Israel Rivera Morales, (answer to question 20) (while working for Miles
 Jackson); First Set of Interrogatories, Nelson Sanabria Flores, (answer to question 20)
 (while working for Jeffrey Upchurch); First Set of Interrogatories, Juan García Carrero,
 (answer to question 20) (while working for Jeffrey Upchurch); First Set of Interrogatories,
 Efraín Alvarez Rosa, (answer to question 21) (while working for Daniel Nelson); deposition

CIVIL 97-1589 (JAG)

44

water for cooking or bathing in violation of 29 C.F.R. § 1910.142(f)(3) and/or the N.C. Gen. Stat. § 95-225(g)(2) (1997)⁸⁰; failing to provide laundry facilities in violation of 29 C.F.R. § 1910.142(f)(1)⁸¹; failing to provide heat in violation of 20 C.F.R. § 654.409(a)

of Efraín Alvarez Rosa, at 25, ll. 8-22; First Set of Interrogatories, Roberto Christian Rodríguez, (answer to question 21) (while working for Randy Rosser); deposition of Roberto Christian Rodríguez, at 66, ll. 12-16; at 67, ll. 14-24; at 68-71; at 72, ll. 1-13.

⁸⁰Title 29 C.F.R. § 1910.142(f)(3) reads: "An adequate supply of hot and cold running water shall be provided for bathing and laundry purposes. Facilities for heating water shall be provided." N.C. Gen. Stat. § 95-225(g)(2) (1997) reads, in its pertinent part: "A kitchen facility shall be provided with ... a sink with running hot and cold water." For the relevant complaints, see, e.g., Docket No. 141, Plaintiffs' Opposition, Exhibit 59, First Set of Interrogatories, Baltazar Ortiz Correa, at 9 (answer to question 21); First Set of Interrogatories, Edwin Echevarría, (answer to question 21); First Set of Interrogatories, Richard Rivera Flores, (answer to question 21); First Set of Interrogatories, Luis Angel Alvarez Rosa, (answer to question 21); deposition of Heriberto Alvarez Rosa, at 38, ll. 19-20; First Set of Interrogatories, Efraín Alvarez Rosa, (answer to question 21).

⁸¹Title 29 C.F.R. § 1910.142(f)(1) reads, in its relevant part:

Laundry, handwashing, and bathing facilities shall be provided in the following ratio:

- (i) Handwash basin per family shelter or per six persons in shared facilities.
- (ii) Shower head for every 10 persons.
- (iii) Laundry tray or tub for every 30 persons.
- (iv) Slop sink in each building used for laundry, handwashing, and bathing.

See also N.C. Gen. Stat. § 95-225(a), which stipulates that, "Unless otherwise provided, all established federal standards are adopted and shall be enforced by the Department of Labor of North Carolina." For the relevant complaints, see, e.g., Docket 141, Plaintiffs' Opposition, Exhibit 59, First Set of Interrogatories, Baltazar Ortiz Correa, at 9 (answer to question 21); First Set of Interrogatories, Domingo Colón Ayala, (answer to question 21); First Set of Interrogatories, Juan Vélez Serrano, (answer to question 21); First Set of Interrogatories, Jesús Barreto Bermúdez, (answer to question 21); First Set of Interrogatories, Pedro Sánchez Díaz, (answer to question 21); deposition of Saturnino Medina Avilés; First Set of Interrogatories, Abraham Garayúa Candelario, (answer to question 21); First Set of Interrogatories, Jesús Rivas Rosado, (answer to question 21) (while working for Cabell Early).

CIVIL 97-1589 (JAG)

45

and/or 29 C.F.R. § 1910.142(b)(11) and/or N.C. Gen. Stat. § 95-225(e) (1997)⁸²; failing to provide sufficient beds for all workers in violation of 20 C.F.R. § 655.102(b)(1) and 29

⁸²Title 20 C.F.R. § 654.409(a) requires that

All living quarters and service rooms shall be provided with properly installed, operable heating equipment capable of maintaining a temperature of at least 68 <<degrees>> F. if during the period of normal occupancy the temperature in such quarters falls below 68 <<degrees>>.

Title 29 C.F.R. § 1910.142(b)(11) reads

All heating, cooking, and water heating equipment shall be installed in accordance with State and local ordinances, codes, and regulations governing such installations. If a camp is used during cold weather, adequate heating shall be provided.

N.C. Gen. Stat. § 95-225(e) reads

Whenever the outside temperature falls below 50 degrees Fahrenheit and the migrant housing is occupied, heating equipment shall be provided and operable. Regardless of outside temperature, this equipment must be capable of maintaining living areas of 65 degrees Fahrenheit. If housing is to be occupied from May 15 until September 1 only, no heating equipment shall be required at the time of preoccupancy inspection.

See, e.g., Docket No. 141, Plaintiffs' Opposition, Exhibit 59, First Set of Interrogatories, Carlos Pérez Adames, at 9, 10 (answer to question 21); First Set of Interrogatories, Héctor Pérez Soto, (answer to question 21); First Set of Interrogatories, Radamés Pacheco, (answer to question 21); First Set of Interrogatories, Edwin Febus Rivera, (answer to questions 20-21); First Set of Interrogatories, Luis Hernández Meléndez, (answer to questions 20-21); First Set of Interrogatories, Louis González Gauthier, (answer to question 21); deposition of Louis González Gauthier, at 25, ll. 12-13; First Set of Interrogatories, Juan González Gauthier, (answer to question 21); deposition of Juan González, at 67, ll. 14-21; First Set of Interrogatories, Jesús Rivas Rosado, (answer to question 21); First Set of Interrogatories, Nelson Sanabria Flores, (answer to question 20); First Set of Interrogatories, Juan García Carrero, (answer to question 20); First Set of Interrogatories, Roberto Christian Rodríguez, (answer to question 21).

CIVIL 97-1589 (JAG)

46

C.F.R. § 1910.142(b)(3)⁸³; of providing housing with leaking roofs in violation of 29 C.F.R. § 1910.142(b)⁸⁴; of providing housing infested with pests in violation of 29 C.F.R. §

⁸³In particular, 20 C.F.R. § 655.102(b)(1) stipulates, in its relevant part, that: “The employer shall provide to those workers who are not reasonably able to return to their residence within the same day housing, without charge to the worker[.]”

See, e.g., Plaintiffs’ Opposition, Exhibit 59, First Set of Interrogatories, Radamés Pacheco, (answer to question 21).

⁸⁴29 C.F.R. § 1910.142(b) reads: “Every shelter in the camp shall be constructed in a manner which will provide protection against the elements.” See, e.g., Plaintiffs’ Opposition, Exhibit 59, First Set of Interrogatories, Carlos Pérez Adamés (answer to question 21); First Set of Interrogatories, Héctor Pérez Soto (answer to question 21); Deposition of Gabriel Ramos Rojas, p. 66, ll. 20-24; 67, ll. 1-15; First Set of Interrogatories, Jesús Rivas Rosado (answer to question 21); Nelson Sanabria Flores (answer to question 20); First Set of Interrogatories, Juan García Carrero (answer to question 20).

CIVIL 97-1589 (JAG)

47

1910.142(j) and/or N.C. Gen. Stat. 95-225(g) (1997)⁸⁵; of providing toilets that did not work properly or of not providing sufficient functioning toilets in violation of 29 C.F.R. §§

⁸⁵Title 29 C.F.R. § 1910.142(j) stipulates that “Effective measures shall be taken to prevent infestation by and harborage of animal or insect vectors or pests.” In its pertinent parts, N.C. Gen. Stat. 95-225(g) reads

(1) Food preparation facilities and eating areas shall be provided and maintained in a clean and sanitary manner;

...

(4) Acceptable storage facilities shall be provided and shall be kept clean and free of vermin[.]

See Docket No. 141, Plaintiffs’ Opposition, Exhibit 59, First Set of Interrogatories, Carlos Pérez Adames, at 9, 10 (answer to question 21); First Set of Interrogatories, Héctor Pérez Soto, (answer to question 21); First Set of Interrogatories, Abraham Garayúa Candelario, (answer to questions 20-21); First Set of Interrogatories, Israel Martínez Aponte, (answer to question 20); First Set of Interrogatories, Alfredo Nazario, (answer to question 20); First Set of Interrogatories, Jesús Rivas Rosado, (answer to question 21); First Set of Interrogatories, Israel Rivera Morales, (answer to question 20); First Set of Interrogatories, Nelson Sanabria Flores, (answer to question 20); First Set of Interrogatories, Juan García Carrero, (answer to question 20); First Set of Interrogatories, José Luis Vásquez, (answer to question 20) (while working for Terry Neal); First Set of Interrogatories, Efraín Álvarez Rosa, (answer to question 21); First Set of Interrogatories, Roberto Christian Rodríguez, (answer to question 21); deposition of Roberto Christian Rodríguez, at 76, ll. 14-24; at 77, ll. 1-7.

1 CIVIL 97-1589 (JAG)

48

2

3

4

1910.142(d) and/or (d)(5) and/or (d)(10)⁸⁶; and of providing housing with holes in the walls in violation of 29 C.F.R. § 1910.142(b)(1).⁸⁷

5

6

7

8

Nevertheless, defendants contend that they are entitled to summary judgment with respect to the housing violations alleged by plaintiffs. They base this argument on the fact that “prior to plaintiffs’ occupancy of their housing in 1994, defendants had their housing

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

⁸⁶Title 29 C.F.R. § 1910.142(d), in its applicable subsections, reads

(1) Toilet facilities adequate for the capacity of the camp shall be provided.

...

(5) Where toilet facilities are shared, the number of water closets or privy seats provided for each sex shall be based on the maximum number of persons of that sex which the camp is designed to house at any one time, in the ration of one such unit to each 15 persons, with a minimum of two units for any shared facility.

...

(10) Privy and toilet rooms shall be kept in sanitary conditions. They shall be cleaned daily.

See, e.g., Docket No. 141, Plaintiffs’ Opposition, Exhibit 59, First Set of Interrogatories, Carlos Pérez Adames, at 10 (answer to question 21); First Set of Interrogatories, Héctor Pérez, (answer to question 21); First Set of Interrogatories, Domingo Colón, (answer to question 21); First Set of Interrogatories, Juan Vélez, (answer to question 21); First Set of Interrogatories, Jesús Barreto, (answer to question 21); First Set of Interrogatories, Pedro Sánchez, (answer to question 21); First Set of Interrogatories, Edwin Febus, (answer to questions 20-21); First Set of Interrogatories, Luis Hernández Meléndez, (answer to questions 20-21); First Set of Interrogatories, José Luis Vásquez, (answer to question 20).

⁸⁷Title 29 C.F.R. § 1910.142(b)(1) requires “Every shelter in the camp shall be constructed in a manner which will provide protection against the elements.” See, e.g., Docket No. 141, Plaintiffs’ Opposition, Exhibit 59, First Set of Interrogatories, Carlos Pérez Adames, at 9, 10 (answer to question 21); First Set of Interrogatories, Héctor Pérez, (answer to question 21); First Set of Interrogatories, Edwin Echevarría, (answer to question 21) (while working for Dennis Smith); First Set of Interrogatories, Richard Rivera, (answer to question 21); First Set of Interrogatories, Israel Martínez, (answer to question 20); First Set of Interrogatories, Alfredo Nazario, (answer to question 20); First Set of Interrogatories, Israel Rivera, (answer to question 20); First Set of Interrogatories, José Luis Vásquez, (answer to question 20); First Set of Interrogatories, Efraín Alvarez, (answer to question 20); deposition of Efraín Alvarez, at 25-29, 70.

1 CIVIL 97-1589 (JAG)

49

2
3 inspected and certified to ensure that it met the federal standards as set forth in 20 C.F.R.
4 § 655.102(b)(1)(i).⁸⁸ In light of the clear statutory language, it is evident that AWP
5 requires not just pre-occupancy, but continuing compliance throughout occupancy. See
6 Howard v. Malcolm, 658 F. Supp. at 432 (inspection certification does not per se establish
7 the lack of section 1823(a) violations, nor does it stand for the proposition that, even on
8 the date of inspection, the labor camp met all the federal safety and health standards); see
9 also Sánchez v. Overmyer, 891 F. Supp. 1253, 1258 (N.D. Ohio 1995). Defendants'
10 argument, therefore, lacks merit.

11 Defendants look for support in Alvarez v. Joan of Arc, Inc. for the proposition that
12 they were entitled to rely on the state's "inspection, approval, and certification process to
13 show that, prior to occupancy, the housing was up to the required standards."⁸⁹ Unlike in
14 the case at hand, however, in Alvarez v. Joan of Arc, Inc., there was no evidence presented
15 at trial to suggest that the housing was not in compliance with established standards when
16 the workers' tenancy began. See Alvarez v. Joan of Arc, Inc., 658 F.2d at 1222. In
17 addition, the facilities there in question were subjected to follow-up inspections, "from time
18 to time," by employees of the state Department of Public Health and the United States
19 Department of Labor. Id.

20 Defendants alternatively contend that they should not be held liable for any housing
21 violations they may have incurred since these were "*de minimis*," rather than substantive and
22 since none but one of the defendants was cited for housing violations either by the United
23

24 ⁸⁸See Docket No. 115, Defendants' Memorandum for Summary Judgment, at 44.
25 Title 20 C.F.R. § 655.102(b)(1)(i) requires that

26 Housing provided by the employer shall meet the full set of DOL Occupancy
27 Safety and Health Administration standards set forth at 29 C.F.R. §
28 1910.142, or the full set of standards at §§ 654.404-654.417 of this
chapter[.]

⁸⁹See Docket No. 115, Defendants' Memorandum for Summary Judgment, at 45.

1 CIVIL 97-1589 (JAG)

50

2
3 States or the North Carolina Department of Labor. This assertion clearly disregards that,
4 according to 29 C.F.R. § 500.133, “substantive health and safety standards” include, *inter*
5 *alia*, an adequate and sanitary supply of water, structurally sound construction of buildings,
6 effective maintenance of those buildings, provision of adequate heat as weather conditions
7 require, and reasonable protections for inhabitants from insects and rodents.

8
9 Moreover, their argument concerning the failure of the pertinent Departments of
10 Labor to cite them for these alleged violations is irrelevant, since there is no evidence that
11 any post-occupancy inspections took place and since the violations at issue relate to the
12 defendants’ failure to comply with AWPAs’ 29 U.S.C. § 1823(a) and (b)(1) and its
13 regulations, not to the Departments’ failure to enforce these.

14 In view of the above, I recommend that the motion for summary judgment as to
15 defendants’ alleged housing violations be DENIED.

16 (iii) Record Keeping Violations

17 Section 1821(d) imposes on agricultural employers and associations who employ
18 migrant workers a reasonable standard of quality business and record keeping practices
19 which requires them to,

20 (1) with respect to each such worker, make, keep, and preserve records for
three years of the following information

- 21 (A) the basis on which wages are paid;
- 22 (B) the number of piecework units earned, if paid on a piecework basis;
- 23 (C) the number of hours worked;
- 24 (D) the total pay period earnings;
- 25 (E) the specific sums withheld and the purpose of each sum withheld;

26 and

27 (F) the net pay; and

28 (2) provide to each such worker for each pay period, an itemized written
statement of the information required by paragraph (1) of this subsection.

See 29 U.S.C. § 1821(d); see also 29 C.F.R. § 500.80(d).

Plaintiffs allege that the defendants variously failed to comply with their obligations
under AWPAs’ record keeping stipulations by, *inter alia*, misrepresenting in their payroll

CIVIL 97-1589 (JAG)

51

records and wage statements the hours worked by and owed to plaintiffs in violation of 29 U.S.C. § 1821(d)(1)(c)⁹⁰; by making unspecified deductions in violation of 29 U.S.C. § 1821(d)(1)(e)⁹¹; by failing to disclose the piece rate for certain crops in violation of 29 U.S.C. § 1821(d)(1)(a)⁹²; and by failing to provide an itemized written pay statement in violation of 29 U.S.C. § 1821(d)(2).⁹³ See also Washington v. Miller, 721 F.2d at 801-02; Rivera v. Adams Packing Ass'n, Inc., 707 F.2d at 1281-82 (holding that an agricultural employer fails to comply with the record keeping requirements where he maintains records that do not contain the required information or that contain erroneous information— e.g., records that omit or underreport the real total number of hours worked or that fail to report deductions); Escobar v. Baker, 814 F. Supp. at 1506 (stating that one of the purposes of AWPAA is to prevent the exploitation of migrant workers by agricultural employers who make deductions from the workers' pay but refuse to account for these).

⁹⁰See Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibit 53, First Set of Interrogatories, José Enrique Lugo, (answer to question 22) (while working for defendant Phillips); Exhibit 54, First Set of Interrogatories, Darío Llantín, (answer to question 23) (while working for defendant Phillips); Exhibit 55, First Set of Interrogatories, Radamés Pacheco, (answer to question 22) (while working for defendant Newsome Brothers); see also Docket No. 141, Plaintiffs' Opposition, Exhibit 66, deposition of José Enrique Lugo, at 76, ll. 23-25; at 77-79; Exhibit 67, First Set of Interrogatories, George Acosta López, (answers to questions 18, 20, 21).

⁹¹See id., Exhibit 46, Payroll records for the pay date of May 29, 1994, for plaintiff José Raúl Ríos Cruz, while working for defendant Dixon; Exhibit 47, Payroll records for the pay period of June 20, 1994 to June 25, 1994, for plaintiff George Acosta, while working for defendant Newsome.

⁹²See id., Exhibit 46, statement for the pay period comprising June 24, 1994 up to June 30, 1994, for plaintiff José Raúl Ríos Cruz, while working for defendant Dixon.

⁹³See id., Exhibit 51; see also Docket No. 141, Plaintiffs' Opposition, Exhibit 63 (both concerning plaintiff José Ponce's work for defendant William D. Lee). As to plaintiff Heriberto Cruz's claims against defendant Ernest Evans, see id., Exhibit 65. Plaintiffs additionally allege that defendants failed to deduct Social Security taxes.

1 CIVIL 97-1589 (JAG)

52

2
3 Since the defendants—oftentimes without producing any evidence supporting their
4 contentions—simply deny having incurred in any such alleged violations, clearly there exist
5 genuine issues of fact and questions of credibility that need to be resolved at trial.
6 Defendants Dixon, Phillips, Lee, and Evans, for instance, maintain that since there is
7 evidence of record that they may have sometimes complied with their record keeping
8 obligations, the court should simply take their word that they always did. Yet, because the
9 pertinent records should be under their custody and in their possession, there is no reason
10 why their failure to produce this evidence could not be construed as an admission of their
11 failure to comply. Moreover, while at least one defendant—namely, Newsome Brothers—
12 bases his defense on a United States Department of Labor report (conducted between
13 April 11, 1994 and July 31, 1994) whose specific subject matter and findings have not been
14 otherwise introduced into the record, a grower's reliance on Department of Labor approval
15 “[does] not constitute an across-the-board defense to any and all [AWPA] claims.” See
16 H.R. Rep. No. 97-885, at 17-18 (as to Congress' intention “that this section be interpreted
17 with the broadest possible meaning to ensure that the person who owns or controls the
18 facility used as housing ... is responsible for maintaining that facility in compliance with all
19 substantive federal and state safety and health standards”); Donaldson v. United States
20 Dep't of Labor, 930 F.2d at 349 (reliance on Department of Labor approval did not protect
21 growers from liability or preclude recovery by workers); Sánchez v. Overmyer, 845 F. Supp.
22 1183, 1191 (N.D. Ohio 1993) (finding that representative of the state Department of
23 Health was not authorized to create an exception to AWPA's safety and health standards).

24 (iv) Failure to Pay Wages When Due⁹⁴
25

26 ⁹⁴Plaintiff José Raúl Ríos Cruz also claims that defendant Dixon failed to pay him
27 the guaranteed \$5.38/hour rate. See Docket No. 141, Plaintiffs' Opposition, Exhibit 61 and
28 62; see also Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibit
46, statement for the pay period comprising June 17, 1994 up to June 23, 1994, for

1 CIVIL 97-1589 (JAG)

53

2
3 Under AWPB and the relevant federal regulations, defendants were bound to pay
4 the wages owed any migrant worker when due. 29 U.S.C. § 1822(a); 29 C.F.R. § 500.81.
5 Although the regulations only require that agricultural employer and agricultural
6 association pay the worker no less often than every two weeks (or semi-monthly),
7 defendants had agreed, as part of their agricultural working arrangement, to pay workers
8 weekly.⁹⁵

9
10 Among plaintiffs' complaints are the defendants' alleged failure to pay when due; to
11 pay the stipulated and owed piece rate; to pay for travel time from field to field and for
12 otherwise compensable time; and to honor the first week guarantee as stipulated in the
13 Puerto Rico Department of Labor summaries of the Agricultural Work Agreement.⁹⁶ In
14 response to the allegations that they did not pay when due, the defendants have produced
15 documentation purporting to be the payroll records for plaintiffs José Ríos Cruz, George
16 Acosta, and Radamés Pacheco.

17 None of the payroll statements provided for plaintiff José Ríos Cruz, however, bears
18 his signature, as seems to otherwise be the practice among agricultural employers.⁹⁷ The
19 court thus has no way to ascertain their authenticity or the accuracy of the statements

20 plaintiff José Raúl Ríos Cruz, while working for defendant Dixon.

21 ⁹⁵See Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibit
22 1, Job Order Attachment; Exhibit 12.

23 ⁹⁶See, e.g., *id.*, Exhibit 52, First Set of Interrogatories, Efraín Flores, (answer to
24 question 21); Exhibit 53, First Set of Interrogatories, José Enrique Lugo Torres, (answer to
25 question 23); Exhibit 54, First Set of Interrogatories, Darío Llantín Lugo, (answer to
26 question 22); Exhibit 55, First Set of Interrogatories, Radamés Pacheco, (answer to
27 question 22); Exhibit 56, First Set of Interrogatories, Edison Camacho Caraballo, (answers
28 to questions 20-21). See also Docket No. 141, Plaintiffs' Opposition, Exhibit 66,
deposition of José Enrique Lugo, at 76, ll. 23-25; at 77-79; Exhibit 67, First Set of
Interrogatories, George Acosta López, (answer to question 14).

⁹⁷See Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibit
47-48.

1 CIVIL 97-1589 (JAG)

54

2
3 therein. Similarly, there are issues considering certain payroll statements for plaintiff
4 George Acosta. In particular, the signature for plaintiff Acosta's First Set of Interrogatories
5 does not bear a resemblance to that found on the payroll statement for the page stamped
6 "NEW 020," for the pay date of May 30, 1994 (stamped "NEW 001"), for the pay date
7 of June 20, 1994 (stamped "NEW 007"), for the pay date of June 27, 1994 (stamped
8 "NEW 009"), for the pay date of July 5, 1994 (stamped "NEW 011"), for the pay date of
9 July 11, 1994 (stamped "NEW 013"), or for the pay date of July 18, 1994 (stamped "NEW
10 015").⁹⁸ Payroll statements for Radamés Pacheco have similar problems, in that some bear
11 no signature, while others bear signatures of questionable genuineness.⁹⁹

12 Defendants also allege that plaintiffs claims should not be tried given the small
13 monetary difference between what plaintiffs were legally entitled to and what they actually
14 received. Regardless of the amount, however, failure to pay the amount when due violates
15 AWPA and its concomitant regulations.

16 As to the defendants' contention that the "first week guarantee" should not apply
17 to plaintiffs, since they failed to contact the job services office prior to the contractually
18 specified date. Specifically, this guarantee—as codified at 29 C.F.R. §
19 653.501(d)(2)(v)(D)—states that

20
21 If the employer fails to notify the order-holding office at least 10 days prior
22 to the original date of need the employer shall pay eligible ...workers referred
23 through the clearance system the specified hourly rate of pay, or in the
24 absence of a specified hourly rate of pay, the higher of the Federal or State
25 minimum wage for the first week starting with the originally anticipated date
26 of need.

27 ⁹⁸See Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibit
28 47.

⁹⁹See *id.*, Exhibit 47.

1 CIVIL 97-1589 (JAG)

55

2
3 As disclosed in the summaries of job order NC 7930794, however, the defendants
4 simply guaranteed workers the "Salary for the first week of employment."¹⁰⁰ Moreover, the
5 Spanish version plainly states that the first week of "your" (in Spanish, "su") employment
6 is guaranteed. Thus, irrespective of the language of the statute, it appears that the
7 defendants may have actually contracted to guarantee the first week of each worker's
8 employment, without regard to the first date of agricultural need. In addition, the
9 document is unclear on its face as to whether to the nature of the required contact between
10 the potential worker and the "Sanford Esc." One could reasonably construe this clause to
11 mean that the worker must express his interest in the employment offer prior to April 4,
12 1994. Further, there are questions as to whether this practice would be permitted under
13 AWPAs and as to whether plaintiffs received this disclosure prior to such date.

14 Because summary judgment motions are not appropriately rendered based on
15 credibility assessments and because of the existence of genuine issues of material fact, I
16 recommend that the motion for summary judgment as to payment of wages when due be
17 DENIED.

18 (v) Transportation, Field Sanitation, and Working Arrangement Violations, i.e.
19 Provision of Cooking Utensils, Blankets, Sheets, and Pillows, Transportation to the Store

20 Federal regulation 29 C.F.R. § 500.102 requires that any vehicle used by any farm
21 labor contractor, agricultural employer or agricultural association to transport migrant
22 agricultural workers shall meet the vehicle safety standards prescribed in section 500.104
23 or section 500.105 (if a vehicle other than a passenger automobile or station wagon). 29
24 C.F.R. § 500.102.

25 Plaintiffs have claimed that the defendants transported them in trucks without seats
26 or guardrails and in open pickup trucks in violation of 29 U.S.C. § 1841(b)(1)(A) and 29

27 ¹⁰⁰See Docket No. 115, Defendants' Memorandum for Summary Judgment, Exhibit
28 11.

CIVIL 97-1589 (JAG)

56

C.F.R. § 500.102 and § 500.104(l)¹⁰¹ and/or § 500.105(b)(3)(vi)(D)¹⁰² and/or § 500.105(b)(3)(vii)(E).¹⁰³ The evidence of the record as to the issue of these details of transportation, however, consists merely of sworn testimonies by plaintiffs and defendants which clearly raise genuine issues, and is thus not appropriate for summary disposition. Summary judgment as to this issue should be DENIED. This is my recommendation.

As to field sanitation, federal regulation 29 C.F.R. § 1928.110 includes various requirements—i.e., potable drinking water and toilet and hand washing facilities—imposed on agricultural establishments where at least eleven workers are employed. 29 C.F.R. § 1928.110. Under similar North Carolina regulations, however,

[t]he provisions for the Occupational and Health Standards for Agriculture, Title 29 of the Code of Federal Regulations ... are incorporated by reference

¹⁰¹Regulation 29 C.F.R. § 500.104(l) establishes that

[a] seat securely fastened to the vehicle will be provided for each occupant or rider in, or on, any vehicle, except that transportation which is primarily on private farm roads will be excused from this requirement provided the total distance does not exceed ten (10) miles, and so long as the trip begins and ends on a farm owned or operated by the same employer.

¹⁰²Regulation 29 C.F.R. § 500.105(b)(3)(vi)(D) stipulates that,

[a] seat shall be provided for each worker transported. The seats shall be: Securely attached to the vehicle during the course of transportation; not less than 16 inches nor more than 19 inches above the floor; at least 13 inches deep; equipped with backrests extending to a height of at least 36 inches above the floor, with at least 24 inches of space between the backrests or between the edges of the opposite seats when face to face; designed to provide at least 18 inches of seat for each passenger; without cracks more than two inches wide, and the exposed surfaces, if made of wood, planed or sanded smooth and free of splinters.

¹⁰³Regulation 29 C.F.R. § 500.105(b)(3)(vii)(E) requires that,

[n]o motor vehicle shall be driven if the total number of passengers exceeds the seating capacity which will be permitted on seats prescribed in § 500.105(b)(3)(vi). All passengers carried on such vehicle shall remain seated while the motor vehicle is in motion.

CIVIL 97-1589 (JAG)

57

except ... [that under 29 C.F.R. § 1928.110] the scope shall not be limited to any specific number of employees.

13 N.C.A.C. 07F.0301(2). Therefore, as a matter of law, although some defendants claim an exemption from these provisions, all were required to provide field sanitation to all plaintiffs. Likewise, all defendants were contractually obligated to furnish plaintiffs with cooking utensils, blankets, sheets, and pillows and to provide them transportation to the store. Yet, since the evidence concerning whether or not the defendants actually provided the plaintiff workers with any of these consists primarily of sworn testimonies by both plaintiffs and the defendants,¹⁰⁴ the motion for summary judgment on this issue should be DENIED. That is also my recommendation.

(vi) Retaliation

As elsewhere noted in this report and recommendation, statutory provisions should not be rendered meaningless or otherwise treated as surplusage whenever such result can be reasonably avoided. See Williams v. Taylor, 529 U.S. at 404; Babbitt v. Sweet Home Chapter of Communities for a Great Or., 515 U.S. at 698; Ratzlaf v. United States, 510 U.S. at 140; United States v. Rodríguez, 26 F.3d at 8; United States v. Fontana, 948 F.2d at 803.

As defined by subsection (a), discrimination includes, *inter alia*, when a person intimidates, threatens, restrains, coerces, blacklists, and discharges a worker. 29 U.S.C. § 1855(b). AWPAs' section 1855(b), however, directs migrant agricultural workers who

¹⁰⁴There are also two invoices produced by defendant Larry Butner purporting to relate to the matter of toilet provision and cleaning. The name of client and the work descriptions in these documents, however, are seemingly adulterated or otherwise unintelligible. As such, these are not proper supporting evidence in favor of defendant Butner. See Docket No. 115, Defendants' Memorandum of Summary Judgment, Exhibit 43.

CIVIL 97-1589 (JAG)

58

believe that they have been discriminated by any person covered under the Act to file a complaint with the Secretary of Labor within 180 days. 29 U.S.C. § 1855(b).

Defendants avail themselves of this clear language to contend that plaintiff José Enrique Lugo's claim for retaliation had already expired by the time plaintiffs filed their complaint and should thus be dismissed. Plaintiff nevertheless argues that, not only does section 1855 include no provisions for the exhaustion of administrative remedies, but that section 1854 plainly stipulates that any aggrieved party may file a suit in any United States district court "without regard to exhaustion of any alternative administrative remedies provided [therein]." Yet, the turning point in this matter is that regardless of whether or not plaintiff Lugo should have exhausted the administrative remedies, the pertinent Puerto Rico law, i.e., 29 P.R. Laws Ann. § 69(1)(h), states that a one-year statute of limitations applies in anti-discrimination actions.¹⁰⁵ See Delgado Graulau v. Pegasus Communications of Puerto Rico, 130 F. Supp. 2d 320, 333 (D.P.R. 2001); Olmo v. Young & Rubicam of P.R., Inc., 110 D.P.R. 740 (1981). Thus, the defendants' request for dismissal must prevail. I therefore recommend that plaintiff José Enrique Lugo's claim for retaliation be DISMISSED.

INJUNCTIVE AND DECLARATORY RELIEF

The defendants argue that plaintiffs do not have standing to seek equitable and declaratory relief. (Docket No. 115.) Specifically, they argue that plaintiffs cannot ask the court to enjoin them from not providing adequate recruitment disclosures, using false and misleading information and failing to comply with their work arrangement with plaintiffs.

¹⁰⁵Title 29 P.R. Laws Ann. § 69(1)(h) states that

[i]t shall be an unfair labor practice for an employer acting individually or in concert with others ... [t]o discharge or otherwise discriminate against an employee because he has filed charges or given information or testimony under the provisions of this subchapter.

1 CIVIL 97-1589 (JAG)

59

2
3 They stress that this action involves facts occurring in 1994, the only year that the
4 defendants employed the plaintiffs.

5 Plaintiffs argue that they have standing to seek injunctive relief. First, they argue
6 that they have suffered injury. Second, they note the causal connection between their
7 injury and the conduct complained of and third, they argue that it is likely that their injury
8 will be redressed by a favorable decision.

9 I recommend that the defendants' motion to dismiss plaintiffs' claims for declaratory
10 and injunctive relief be DENIED. The standing threshold is easily met. Friends of Earth
11 Inc. v. Laidlaw Env'tl. Servs. (TOC) Inc., 528 U.S. 167, 180-88 (2000). Plaintiffs may have
12 indeed suffered injury, although such a determination has not been made, and they may
13 face the threat of future injury due to non-compliance of the North Carolina growers with
14 federal and state law. Therefore to preclude the possibility of injunctive redress is, at very
15 least, premature, considering the particular facts of this case, the nature of the seasonal
16 work involved, and the facility with which the purpose of the implementing statutes could
17 be circumvented by disallowing the type of injunctive relief which plaintiff seeks, should
18 they prevail.

19 Under the provisions of Rule 510.2, Local Rules, District of Puerto Rico, any party
20 who objects to this report and recommendation must file a written objection thereto with
21 the Clerk of this Court within thirty (30) days of the party's receipt of this report and
22 recommendation. The written objections must specifically identify the portion of the
23 recommendation, or report to which objection is made and the basis for such objections.
24 Failure to comply with this rule precludes further appellate review. See Thomas v. Arn, 474
25 U.S. 140, 155 (1985), reh'g denied, 474 U.S. 1111 (1986); Davet v. Maccorone, 973 F.2d
26 22, 30-31 (1st Cir. 1992); Paterson-Leitch Co. v. Massachusetts Mun. Wholesale Elec. Co.,
27 840 F.2d 985 (1st Cir. 1988); Borden v. Secretary of Health & Human Servs., 836 F.2d 4,
28

CIVIL 97-1589 (JAG)

60

6 (1st Cir. 1987); Scott v. Schweiker, 702 F.2d 13, 14 (1st Cir. 1983); United States v. Vega, 678 F.2d 376, 378-79 (1st Cir. 1982); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980).

At San Juan, Puerto Rico, this 5th day of September, 2001.


JUSTO ARENAS
United States Magistrate Judge